89-749

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION, PETITIONER

v.

ST. PAUL SURPLUS LINES INSURANCE CO., ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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QUESTIONS PRESENTED

Respondents are nationwide insurance companies that issued policies indemnifying petitioner Playtex against the risk of adverse judgments in product liability actions; the policies covered both compensatory and punitive damages. The insurance carriers commenced this preemptive action in Kansas state court seeking a declaratory judgment that they are not obliged to indemnify Playtex for a $10 million punitive damages award entered in a product liability action litigated in Kansas federal district court. Neither Playtex nor any of the insurance companies is a Kansas resident, and it is undisputed that Kansas had no contacts with the negotiation, execution, or performance of the insurance contracts. Respondents nonetheless chose to commence this action in Kansas, apparently because insurance contracts covering punitive damages awards are unenforceable in Kansas. The Kansas courts asserted personal jurisdiction over Playtex, concluded that Kansas law applied, and held that respondents had no obligation to indemnify Playtex. The questions presented are:

1. Whether the Due Process Clause permits the Kansas courts to assert specific personal jurisdiction over Playtex in this action on the theory that the insurance companies' contract claim "arises out of or relates to" sales of Playtex products in Kansas.

2. Whether the Due Process Clause and the Full Faith and Credit Clause permit Kansas to apply its law in adjudicating this contract dispute solely because Kansas' public policy requires that result.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Petitioner is the successor to International Playtex, Inc., and Playtex Family Products, Inc., which were the defendants below. Pursuant to Rule 28.1 of the Rules of this Court, petitioner states that its parent is Playtex FP Group Incorporated; its affiliates (other than wholly owned subsidiaries and affiliates) are M.L. Lee Acquisition Fund, L.P.; Drexel Burnham Lambert, Inc.; and Westinghouse Credit Corporation.

The respondents other than the respondent named in the caption are National Union Fire Insurance Co., International Insurance Co., Granite State Insurance Co., and AIU Insurance Co.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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ST. PAUL SURPLUS LINES INSURANCE CO., ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Playtex Family Products Corporation ("Playtex") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kansas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (App., *infra*, 1a-28a) is reported at 245 Kan. 258 and 777 P.2d 1259. The opinion of the state trial court (App., *infra*, 29a-41a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Kansas (App., *infra*, 42a-43a) was entered on July 14, 1989. On October 3, 1989, Justice White issued an order extending the time within which to file a petition for a writ of certiorari to and including November 11, 1989. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

2. The Full Faith and Credit Clause, Art. IV, § 1, provides, in pertinent part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

STATEMENT

Respondents, five nationwide insurance companies, instituted this action in Kansas state court seeking a declaration that insurance policies they had issued to Playtex did not obligate them to indemnify Playtex for a $10 million punitive damages award entered against Playtex. Even though none of the parties to the insurance contracts is a Kansas resident and the contracts were not made or performed in Kansas, the Kansas courts asserted personal jurisdiction over Playtex, concluded that Playtex's rights under the insurance contracts were governed by Kansas law, and held that Playtex was not entitled to indemnification. This case presents the question whether this sweeping exercise of state power over a nonresident defendant is permissible under the Constitution.

A. The Insurance Policies

Playtex's predecessor in interest was an insured under indemnity insurance contracts issued by respondents in October 1982.[1] Each of these policies incorporated the following provision:

> IT IS THE INTENTION OF THE COMANY [*sic*] AND THE NAMED INSURED THAT PUNITIVE AND EXEMPLARY DAMAGES BE FULLY IN-

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[1] The insurance policies were issued to Esmark, Inc., which at the time was Playtex's parent corporation. App., *infra*, 6a.

SURED TO THE MAXIMUM EXTENT PERMITTED BY LAW SUBJECT TO THE LIMITS OF LIABILITY AS SET FORTH UNDER SECTION III OF THIS POLICY.

App., *infra*, 19a; see also *id.* at 7a. These policies covered a number of different risks, including the risk of adverse judgments in product liability actions. *Id.* at 6a, 35a-36a.

None of the insurance contracts was negotiated, entered into, or issued in Kansas. App., *infra*, 7a, 34a-35a. The Kansas Supreme Court acknowledged that "no activity took place in Kansas with regard to the formation of the insurance contracts." *Id.* at 11a. And none of the parties to the insurance contracts was or is a Kansas corporation; Playtex and its predecessors in interest are Delaware corporations and respondents are incorporated in Delaware and various other states. Indeed, Playtex is not even qualified to do business in Kansas. Finally, the contracts could not be performed in Kansas: indemnification payments to Playtex under the contracts were to be made in Delaware. R. VII, pp. 30-34, 50-52.

B. The *O'Gilvie* Litigation

In 1985, a jury sitting in the United States District Court for the District of Kansas found that Playtex had been "reckless" in failing to warn adequately of the possibility that a woman using its tampons might contract Toxic Shock Syndrome; the jury awarded $1.525 million in compensatory damages and $10 million in punitive damages. The district court remitted the punitive damages to $1.35 million, but the Tenth Circuit (by a divided vote) reinstated the $10 million award, and this Court denied review. *O'Gilvie* v. *International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), cert. denied, 108 S.Ct. 2014 (1988). Shortly after certiorari was denied, Playtex paid the punitive damages portion of the judgment together with $3 million in interest from its Dela-

ware headquarters. R. VII, pp. 30-31, 34, 50-52. Playtex's insurers paid the compensatory damages award and the interest thereon. The judgment in favor of the plaintiff in *O'Gilvie*, who was a Kansas resident, has thus been satisfied in full.

C. The Declaratory Judgment Action

Three months *before* this Court denied certiorari in *O'Gilvie*, and therefore three months before their duty to indemnify Playtex arose, respondents sought to avoid their obligation under the insurance contracts by filing this action in Kansas state court seeking a declaratory judgment that they were not required to indemnify Playtex for the punitive damages award. Recognizing that personal jurisdiction over Playtex might not be available in Kansas, respondents at the same time commenced an identical declaratory judgment action in Minnesota, where the home office of the lead carrier was located; that action was stayed pending the outcome of the Kansas litigation. App., *infra*, 5a.[2]

The Kansas trial court granted the relief requested by respondents on summary judgment, holding that Kansas public policy precluded enforcement of the insurance contracts. App., *infra*, 29a-41a. The trial court rejected the contention that it lacked personal jurisdiction over Playtex. The court stated that "this action for declaratory relief is one which lies in the wake of the commercial activities by which [Playtex] submitted to the jurisdiction of the Kansas courts" in the *O'Gilvie* tort action. App., *infra*, 39a. The court did not make any findings

[2] Playtex responded to these preemptive strikes by filing an action to enforce the insurance contracts in Delaware state court. Respondents opposed Playtex's motion for summary judgment in Delaware by arguing that there were issues of fact that required discovery. Shortly thereafter, respondents themselves sought—and obtained—partial summary judgment in the Kansas action. The Delaware court later stayed its proceedings pending the outcome of the Kansas litigation. App., *infra*, 5a-6a, 31a.

regarding the nature of Playtex's activities within Kansas.

The trial court further concluded that Kansas law should be applied to decide whether the insurance contracts could be enforced. Finding that "[i]t is a clearly expressed public policy of the State of Kansas that punitive damages for direct liability cannot be insured against," the court stated that the State's "interest in protecting its citizens" would be undermined if Kansas law were not applied to bar enforcement of the contracts. App., *infra*, 39a.

The Kansas Supreme Court affirmed. App., *infra*, 1a-28a. It held that personal jurisdiction over Playtex was authorized by the provision of the state long arm statute providing jurisdiction with respect to a cause of action arising from the "'[t]ransaction of any business within this state.'" *Id.* at 9a (quoting K.S.A. § 60-308(b)(1) (1988 Supp.)). "The question of coverage arises from the actions taken by Playtex in selling its product in Kansas, which subsequently caused the death of a Kansas resident. The plaintiff insurers' claim for an insurance coverage determination lies in the wake of the commercial activities of Playtex in Kansas." *Id.* at 11a.[3]

The Kansas Supreme Court rejected Playtex's claim that Kansas' assertion of personal jurisdiction violated the Due Process Clause. App., *infra*, 12a-15a. Although the court below acknowledged that "no activity took place in Kansas with regard to the formation of the insurance contracts" (*id.* at 11a), it held that Playtex had "the requisite minimum contacts with the State of Kansas"

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[3] The state supreme court did not make any findings regarding the nature and extent of these "commercial activities." There was no evidence of any sales or advertising by Playtex in Kansas. In fact, Playtex does not directly engage in *any* commercial activities in Kansas. It sells its tampons from its Delaware factory to distributors who in turn sell the products in Kansas. App., *infra*, 8a.

because "Playtex knew that its tampons were distributed in Kansas" and thus that "[t]here was a product liability risk under the insurance policies arising from the sale of Playtex tampons in Kansas." *Id.* at 14a, 12a. Moreover, the court stated that "the State of Kansas has a significant policy interest justifying its assertion of personal jurisdiction over Playtex." *Id.* at 14a.

The Kansas Supreme Court also upheld the lower court's determination that Kansas law applied in adjudicating the merits of the insurers' claim. It held that Kansas public policy required the application of Kansas law. App., *infra*, 17a, 20a-22a, 24a. The court rejected Playtex's argument that the application of Kansas law violated the Due Process and Full Faith and Credit Clauses, again invoking the State's public policy against insurance of punitive damages. *Id.* at 17a-18a.

REASONS FOR GRANTING THE PETITION

This case involves a blatant example of successful forum shopping by preemptive strike. Respondent insurance companies—not the parties one would expect to initiate litigation in a dispute over an indemnification obligation, particularly in view of the fact that the judgment giving rise to the obligation had not yet become final—brought this action in Kansas state court in an obvious effort to gain the benefit of a Kansas legal rule favoring their position.[4] The Kansas courts obliged, despite the absence of any meaningful connection between their State and this contract dispute, adopting an extremely broad view of their power to assert personal jurisdiction over

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[4] The logical forum for this litigation—Delaware, Playtex's state of incorporation, and the place where payment of the indemnity was to occur—has adopted the majority rule permitting insurance contracts covering punitive damages. See *Whalen* v. *On-Deck, Inc.*, 514 A.2d 1072, 1074 (Del. 1986).

a nonresident defendant and then apply Kansas law to the controversy.

This Court in recent years has repeatedly rejected such broad assertions of state power, holding that the Due Process Clause circumscribes the states' authority to assert personal jurisdiction over nonresident defendants and then apply their own law in determining those defendants' rights. See, *e.g.*, *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). The decision below promotes the very unfairness and unpredictability that these due process principles are designed to prevent and infringes upon federalism values as well: by arrogating to itself the right to decide which state's law should be applied to the transaction, and then picking its own law, the Kansas Supreme Court prevented other states that had a significantly greater relationship to the transaction, such as Delaware, from choosing the applicable law. The court's expansive view of its authority to subject nonresident defendants to specific jurisdiction thus worked in tandem with its expansive conception of the applicability of Kansas law to cause Playtex tremendous unfairness and increase Kansas' authority, while effecting a corresponding diminution in the power of Kansas' sister states.

Although the Kansas Supreme Court's decision is extreme in its view of state power, it is representative of the confusion in the lower courts regarding the proper scope of specific personal jurisdiction. These courts apply sharply divergent approaches in determining whether a plaintiff's claim is sufficiently related to the nonresident defendant's contacts with the forum to permit the assertion of jurisdiction; the conflicting approaches lead to inconsistent results. This Court should grant the petition to resolve the conflict among the lower courts and reaffirm the importance of the constitutional limitations upon state authority.

I. THE DUE PROCESS CLAUSE BARS THE KANSAS COURTS FROM ASSERTING PERSONAL JURISDICTION OVER PLAYTEX ON A SPECIFIC JURISDICTION THEORY, BECAUSE RESPONDENTS' CONTRACT CLAIM IS NOT SUFFICIENTLY RELATED TO PLAYTEX'S KANSAS CONTACTS

The states' authority to assert personal jurisdiction over nonresident defendants falls into two analytically distinct categories. "Specific jurisdiction" describes the states' power to assert personal jurisdiction over a defendant in connection with "a controversy [that] is related to or 'arises out of' a defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 & n.8 (1984). "General jurisdiction" describes the states' power to "exercise[] personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9.

This case concerns the constitutional limitations on a state's power to assert specific jurisdiction over a nonresident defendant. The Due Process Clause of the Fourteenth Amendment "operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants." *Kulko* v. *Superior Court*, 436 U.S. 84, 91 (1978). The Court has sought in a number of decisions to define the "minimum contacts" between forum and defendant that the Due Process Clause requires before a state may subject a nonresident defendant to specific jurisdiction. See, *e.g.*, *Asahi Metal Industry Co.*, *supra*; *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); *Kulko*, *supra*; *Hanson* v. *Denckla*, 357 U.S. 235 (1958). But it has provided no guidance at all with respect to a closely related issue of critical importance—the nature of the connection between the plaintiff's cause of action and the defendant's contacts with the forum that the Due Process

Clause demands as the prerequisite for the exercise of specific jurisdiction.

Thus, although the Court has repeatedly remarked that a state may invoke specific jurisdiction only when the claim "arises out of or relates to" the defendant's contacts with the forum, it has never given content to that standard by applying it in a case in which there was a dispute about the sufficiency of the connection between the defendant's contacts with the forum and the subject matter of the lawsuit. Indeed, the Court only recently has reserved decision of that issue. See *Helicopteros*, 466 U.S. at 415 & n.10.

In the absence of guidance from this Court, the lower state and federal courts have adopted conflicting standards for determining whether the connection between the forum contacts and the cause of action is close enough to allow the assertion of specific jurisdiction over the defendant. And because the nature and quantity of contacts between defendant and forum necessary to support specific jurisdiction is much less than that needed to establish general jurisdiction, plaintiffs—and lower courts with a broad view of their own authority—have a considerable incentive to interpret the Due Process Clause as requiring only the loosest connection between the claim and the defendant's contacts with the forum. In that way, claims against defendants, like Playtex, that could not be subjected to a state's general jurisdiction may be shoehorned improperly into the state's specific jurisdiction.

The present case is a textbook example of that unfortunate and unfair development. Applying an extremely expansive view of the scope of specific jurisdiction, the Kansas Supreme Court concluded that the presence of Playtex products in Kansas subjected Playtex to the jurisdiction of the Kansas courts in this contract action instituted by its insurance companies. Basing jurisdiction over a defendant in a *tort* action on sales of the defendant's product within the forum is supported by this

Court's cases, but we are aware of no due process precedent that justifies extending such specific jurisdiction beyond the immediate tort claim to encompass a *contract* claim, especially where, as here, the contracts at issue have no direct relationship to the sales of the defendant's products.

The issue in this case is of substantial practical importance to every company that engages in business across the United States. This Court should grant the petition for a writ of certiorari to resolve the conflict among the lower courts with respect to this issue and to determine whether the Due Process Clause permits such a broad expansion in the scope of specific jurisdiction.

A. The Kansas Supreme Court Adopted An Impermissibly Broad Definition Of Specific Jurisdiction That Is Inconsistent With This Court's Precedents.

In *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), this Court considered a question related to the one presented here. *McGee* was a suit on an insurance contract; the issue before the Court was whether the defendant's contacts with California were sufficient to support personal jurisdiction with respect to the contract claim. The Court held that due process was satisfied only because "the suit was based on a contract which had substantial connection with [California]." 355 U.S. at 223. The Court observed that "[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Ibid.*; see also *Burger King*, 471 U.S. at 479-482 (looking to the relationship between the forum and the making and performance of the contract to determine whether the forum could assert specific personal jurisdiction over the nonresident defendant).

By contrast, when confronted with contract actions in which there was no direct relationship between the contract and the forum, this Court has held that due process

barred the forum from asserting specific jurisdiction over the nonresident defendant. In *Hanson* v. *Denckla*, *supra*, for example, the Court concluded that Florida could not subject a nonresident trustee to specific jurisdiction in an action to determine the validity of a trust agreement, because the agreement "was entered without any connection with the forum State"—it was executed outside the forum by residents of other states and performed in other states as well (357 U.S. at 252). See also *Kulko*, 436 U.S. at 97 (same).

The Kansas Supreme Court acknowledged that in this case, as in *Hanson* and *Kulko*, the forum had *no* contacts with the making of the contracts at issue. App., *infra*, 11a. It is undisputed that the contracting parties were not based in Kansas, that the contracts were not negotiated, issued, or delivered in Kansas, and that performance was not intended to occur in Kansas. The Kansas court held that the assertion of specific jurisdiction was nonetheless proper because respondents' contract claim "lies in the wake" of "the actions taken by Playtex in selling its product in Kansas." *Ibid.* The court's reliance on commercial activity that was in no way directly related to the insurance contracts stretches the concept of specific jurisdiction beyond any reasonable bounds.

The absence of any contacts between Kansas and the insurance contracts themselves makes clear that the decision in this case significantly expands specific jurisdiction beyond its previously recognized scope. It is one thing for sales of a defendant's products within a state to give rise to specific jurisdiction in tort actions involving injuries allegedly caused by those very products, or for contacts between the forum and a contract to permit the assertion of specific jurisdiction in an action involving a dispute over that very contract. But the nexus requirement is diminished to the point of triviality if product sales may be relied upon to support specific jurisdiction over the nonresident defendant in a contract action as to which

those product sales bear at most only an attenuated relationship.

This Court's decision in *Rush* v. *Savchuk*, 444 U.S. 320 (1980), strongly supports the conclusion that the Kansas Supreme Court stretched the concept of specific jurisdiction beyond the breaking point in this case. The issue in *Rush* was whether a state could obtain jurisdiction over an alleged tortfeasor based on the "presence" within the state of the insurance policy that provided the defendant with coverage for the automobile accident at issue. The Court held that jurisdiction could not be established on this basis. As the Court explained:

> The insurance policy is not the subject matter of this case * * * nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.

444 U.S. at 329. Here, the insurance contracts *are* the subject matter of the case; indeed, they are the sole subject because the tort action has been resolved and the Kansas resident's interest in collecting the tort judgment has been fully satisfied. The facts underlying the tort claim—including the sales of Playtex products within Kansas—are irrelevant to "the substance[] of the litigation" and therefore do not "demonstrate ties between the defendant and the forum" (*ibid.*). *Rush*'s insight that, for purposes of minimum contacts analysis, an insurance contract is not "related to the operative facts of the negligence action" is dispositive in this context as well.

The Kansas Supreme Court's contrary approach recreates the very *quasi in rem* jurisdiction that *Rush* held violative of due process. Instead of relying on the presence of an insurance "res" to justify jurisdiction over a nonresident defendant in a tort action, the Kansas court

has relied on a different, but equally unrelated, "res"—Playtex's products—to support jurisdiction over Playtex in this contract action.[5]

Moreover, under the Kansas Supreme Court's theory, *Hanson* and *Kulko* were wrongly decided, because in each case there were contacts between the forum and the dispute at least as significant as the contact relied on by the court below. Thus, in *Hanson* the defendant remitted trust income to Florida under the trust agreement that was the subject of the dispute, but the Court concluded that those actions were not sufficiently related to the agreement to permit Florida to assert jurisdiction over the trustee in an action unrelated to his payments. 357 U.S. at 252; see also *Kulko*, 436 U.S. at 95-97 (similar analysis). These decisions lend further support to the conclusion that Playtex's contact with Kansas is insufficient to support jurisdiction.

The constitutional invalidity of the Kansas Supreme Court's approach is further illuminated by considering the implications of its jurisdictional analysis. For example, if a California resident had an automobile accident in Kansas, his non-Kansas insurer would be able to institute a declaratory judgment action against him in Kansas in the event of a dispute over the interpretation of the non-Kansas insurance contract. Moreover, the implications of

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[5] The Kansas Supreme Court also noted (App., *infra*, 11a-14a) that the underlying tort action had been litigated in Kansas and that the punitive damages judgment had been entered in Kansas, as if those facts provided additional support for the determination that the contract claim arose in Kansas. But they cannot remedy the constitutionally defective connection between Kansas and this contract action. The presence of the *O'Gilvie* litigation in federal court in Kansas was the result of the decision of that *plaintiff* to commence that action there. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum." *Hanson*, 357 U.S. at 253; see also *Asahi*, 480 U.S. at 109-112 (plurality opinion); *World-Wide Volkswagen*, *supra*; *Kulko*, 436 U.S. at 93-94.

the Kansas court's decision are not limited to the insurance context. If a truck carrying goods from New York to California had an accident in Kansas, and the non-Kansas shipper and non-Kansas receiver could not agree as to who bore the risk of loss under the non-Kansas shipping contract, either could sue the other in Kansas under the contract simply because the accident occurred there. Similarly, Kansas could assert jurisdiction over a dispute regarding the insurance policy covering the shipped goods.

There simply is no warrant for such a wholesale expansion in specific jurisdiction. Rather, by departing from the relatively close connection between contact and cause of action that has characterized this Court's prior specific jurisdiction cases, the Kansas Supreme Court's decision "represents an unwarranted extension of [this Court's precedents] and would, if sustained, sanction a result that is neither fair, just, nor reasonable." *Kulko*, 436 U.S. at 92. Indeed, the decision below deviates sharply from this Court's precedents.

First, the Court has concluded that a forum may only assert jurisdiction over a nonresident defendant that has "purposefully availed" itself of the benefits of the forum's laws in conducting business there. See, *e.g.*, *Hanson*, 357 U.S. at 253; *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). This trade-off becomes quite unfair where, as here, the legal claim bears only the most attenuated relationship to the defendant's in-forum activity. *Playtex did not avail itself of the protection of any Kansas laws regulating insurance contracts.*[6] The parties to

[6] The fact that the contracts covered risks in Kansas and contained certain endorsements required by Kansas law (see App., *infra*, 11a-12a) does not supply the requisite link to Kansas, because the contracts provided nationwide coverage and thus contained endorsements required by virtually every other state. The endorsements accordingly "can have no jurisdictional significance." *Rush*, 444 U.S. at 330; see also *World-Wide Volkswagen*, 444 U.S. at 298-299.

these contracts agreed to indemnification with respect to nationwide risks; no particularized benefits were sought from Kansas. Where that critical element is absent, this Court's decisions make clear that a nonresident defendant such as Playtex may not be subjected to personal jurisdiction. *Asahi*, 480 U.S. at 111-113 (O'Connor, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ.); *World-Wide Volkswagen*, 444 U.S. at 297-299; *Kulko*, 436 U.S. at 94 & n.7.

Second, the Due Process Clause requires "a degree of predictability * * * that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. When Playtex entered into the insurance contracts, it could not have reasonably expected that it could be haled before a Kansas court in a suit seeking an interpretation of the contracts. Permitting specific jurisdiction to rest on an attenuated connection between the forum and the cause of action, as the Kansas court did here, would eliminate all predictability in this area. A defendant would never know whether an act connected to a state might later be found tangentially related to some cause of action and therefore subject him to suit there on a wholly unforeseeable claim. This Court has rejected the "mechanical rule" that a seller's amenability to suit travels with the chattel (*World-Wide Volkswagen*, 444 U.S. at 296; see also *Asahi*, 480 U.S. at 111-113 (opinion of O'Connor, J.)), but the decision below rests squarely on that principle, allowing Playtex to be sued on virtually any claim in any state in which its products may be sold.

Third, the due process constraints on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States." *Hanson*, 357 U.S. at 251. Allowing a state to assert personal jurisdiction over a

defendant on the basis of a tangential relationship infringes upon the authority of other states that have a more direct connection with the contractual dispute. For example, Delaware, which is Playtex's state of incorporation and the state in which the contracts were to be performed, plainly has a much closer connection to the dispute. In sum, each of these policies weighs against the expansive approach adopted by the Kansas Supreme Court.

In reaching a contrary conclusion, the court below placed considerable emphasis (App., *infra*, 14a-15a) on Kansas' purported interest in effectuating its public policy regarding the availability of insurance covering punitive damages. As a threshold matter, because the plaintiffs are not Kansas residents, "[Kansas'] legitimate interests in the dispute have considerably diminished." *Asahi*, 480 U.S. at 114. Like the Supreme Court of California in *Asahi* (*ibid.*), the Kansas court claimed an interest in ensuring the deterrent effect of the Kansas tort judgment. But, as in *Asahi*, the dispute between Playtex and its insurers "is primarily about indemnification," because the judgment in favor of the plaintiff in *O'Gilvie* has been satisfied. *Ibid.* The amount of the punitive damages award, the stigma associated with such an award, and the fact that the award is likely to be reflected in increased insurance costs or the inability to obtain insurance at all, guarantees a significant deterrent effect. Cf. *id.* at 115. Kansas' interest in deterrence is accordingly quite remote here.

More importantly, the mere fact that Kansas might have an interest in the outcome of a particular legal dispute does not mean that Kansas may require a nonresident defendant to appear before its courts. This Court has repeatedly held that the existence of such a state interest is not sufficient to establish jurisdiction. See *World-Wide Volkswagen*, 444 U.S. at 294; *Kulko*, 436 U.S. at 98-100; *Shaffer* v. *Heitner*, 433 U.S. 186, 215 (1977); *Hanson*, 357 U.S. at 254. The strength of a

state's policy interest is a factor to be considered *after* the contacts between the defendant and the forum have been found to have the constitutionally necessary connection with the plaintiff's cause of action. The Kansas Supreme Court's approach—allowing a policy interest to substitute for a relationship between the forum and the contracts at issue—is pure bootstrapping that permits circumvention of the due process limits on state authority.

B. The Lower Courts Have Adopted Conflicting Standards For Determining Whether A Particular Claim Arises Out Of Or Relates To The Defendant's Contacts With The Forum.

The Kansas Supreme Court's decision reflects a deep division among the lower courts over the proper scope of personal jurisdiction. The federal courts of appeals and state supreme courts have adopted at least two distinct approaches for determining whether—under the governing federal due process principles—a particular cause of action is sufficiently related to the defendant's contacts with the forum to permit the assertion of specific personal jurisdiction over the defendant. The conflict over this basic, and frequently recurring, issue of federal constitutional law plainly warrants this Court's attention.

Some courts have applied a lenient standard, most often characterized as a "but for" test, in assessing the sufficiency of the claim's connection to the forum: as long as the plaintiff can show that its claim would not have arisen but for the event that is connected to the forum, specific jurisdiction is permissible. *Third National Bank* v. *Wedge Group Inc.*, 882 F.2d 1087, 1091 & n.2 (6th Cir. 1989); *Gates Learjet Corp.* v. *Jensen*, 743 F.2d 1325, 1331-1332 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985); cf. *Southwire Co.* v. *Trans-World Metals & Co.*, 735 F.2d 440, 442-444 (11th Cir. 1984) (construing similar requirement under Georgia long arm statute).

Other courts utilize a more restrictive standard; although their approach often is not formally denominated

a test, these courts clearly require a more substantial connection between the forum contacts and the plaintiff's claim. *Dollar Savings Bank* v. *First Security Bank*, 746 F.2d 208, 212-213 (3d Cir. 1984); *Gelfand* v. *Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-322 (2d Cir. 1964); *Camelback Ski Corp.* v. *Behning*, 539 A.2d 1107, 1111-1112 (Md.), cert. denied, 109 S.Ct. 130 (1988); cf. *Marino* v. *Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) (interpreting similar language of Massachusetts long arm statute); *Pearrow* v. *National Life and Accident Insurance Co.*, 703 F.2d 1067 (8th Cir. 1983) (construing Arkansas long arm statute).

Some of the courts applying this restrictive standard have expressly adopted the "substantive relevance" test proposed by Professor Brilmayer. *State ex rel. La Manufacture Francaise des Pneumatiques Michelin* v. *Wells*, 657 P.2d 207, 210-211 (Or. 1982) (en banc); see also *City of Virginia Beach* v. *Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985); see generally Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77 (1980); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988). Under this approach, a contact counts for specific jurisdiction purposes only if the conduct of the defendant that gives rise to the contact is relevant in adjudicating the merits of the particular dispute.

For example, assume that A and B, both Virginia residents, are principals in a Virginia partnership that does business in Virginia. A is injured in an auto accident while on vacation in New York. B sues A in New York seeking damages for breach of the partnership agreement on the ground that, as a result of the accident, A sustained injuries that make him unable to carry out his partnership obligations. Virginia plainly would have a number of substantively relevant contacts with an action to enforce the partnership agreement, because the conduct

that occurred in Virginia bears great relevance to adjudication of the contract action. But the fact that A incurred his injury in New York would not give that state a substantively relevant contact with the contract dispute. The injury in New York would be a "but for" cause of the contract action—the dispute would not have arisen if the accident had not taken place—but, because the New York-related event has nothing to do with the merits of the contract action, the New York contact would not be substantively relevant. See Brilmayer, 101 Harv. L. Rev. at 1457-1458. Indeed, the "substantive relevance" standard is expressly designed to be more restrictive than the "but for" test. *Id.* at 1458, 1462-1463.

Simply reviewing the lower court decisions may mask this conflict somewhat: the inquiry is quite fact specific, and the courts often recite the particular case's facts without explaining the principle that guides the inquiry. But several courts and commentators have recently acknowledged the existence of different standards for assessing the sufficiency of the forum's link to the cause of action, recognizing that these disparate standards lead to differing results. See *Shute* v. *Carnival Cruise Lines*, 863 F.2d 1437, 1443 (9th Cir. 1988);[7] *Third National Bank*, 882 F.2d at 1091 n.2 (expressly rejecting the "substantive relevance" approach); see also *Helicopteros*, 466 U.S. at 426-427 & n.5 (Brennan, J., dissenting) (discussing different standards for scope of specific jurisdiction); Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 652 n.185, 662-663 & nn.230-235 (1988) (observing that some courts have adopted the substantive relevance test, while others have applied "a looser 'relatedness' standard" such as the "but for" test); Terez, *The*

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[7] Although the opinion in *Shute* was withdrawn pending the Washington Supreme Court's response to a certified question (see 872 F.2d 930 (1989)), that fact does not discredit the court of appeals' observation regarding the disparate approaches of the lower courts.

Misguided Helicopteros *Case: Confusion in the Courts Over Contacts*, 37 Baylor L. Rev. 913, 940-941 (1985) (discussing different standards).

The present case perfectly illustrates these different approaches. The Kansas Supreme Court explicitly applied a "but for" test. It concluded that jurisdiction was available because "if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurers." App., *infra*, 12a.

Under the more restrictive standard dictated by this Court's precedents and applied by other courts, however, the connection between the sale of Playtex products and this contract action would be deemed too attenuated to support specific jurisdiction. The product sales, while important to the tort action brought by the Kansas resident, are not sufficiently related to the insurance contract dispute to make the assertion of jurisdiction over that dispute fair or reasonable. See pages 10-17, *supra*. Moreover, it is clear that jurisdiction would not be available under the "substantive relevance" test. The sale of Playtex products in Kansas is one of the reasons that the contract dispute arose, but—like the New York accident in the hypothetical discussed above—the fact of those product sales has no bearing whatsoever on the legal rules governing the interpretation of the insurance contracts. The conflict among the lower courts is thus squarely presented in this case.

C. The Proper Scope Of Specific Jurisdiction Is An Important Issue That Should Be Addressed By This Court.

The proper scope of a court's authority to assert specific jurisdiction over a nonresident defendant is an important issue of federal constitutional law that warrants this Court's attention. To begin with, this Court's recent decision in *Helicopteros* gives plaintiffs a considerable in-

centive to fit their claims within the specific jurisdiction rubric. In view of the heavy burden that a plaintiff bears in showing that a defendant is subject to a state's general jurisdiction (see *Helicopteros*, 466 U.S. at 415-418), the advantage for a forum shopping plaintiff of being able to squeeze a claim within the specific jurisdiction category is obvious. Expansive decisions such as the decision below thus threaten to blur the critical distinction between specific and general jurisdiction and subject a nonresident defendant that has some minimal contacts with a forum to suit there on virtually any claim, no matter how attenuated the relationship between the contact and the particular claim.

This result is not only unfair; it also greatly expands the number of potential fora in which multi-state businesses are subject to suit and thus fosters the very sort of forum shopping that occurred here. As noted above, respondents rushed to file this action in Kansas, seeking a declaration that they had no obligation under the insurance contracts, even before their obligation to indemnify Playtex arose, in order to take advantage of the minority Kansas rule prohibiting insurability against punitive damages claims.[8]

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[8] The particular technique utilized by respondents in the present case—the filing, in a jurisdiction with a favorable legal rule, of a preemptive action by insurers seeking a declaration regarding their contractual obligations—is a rapidly growing phenomenon. See, *e.g.*, *St. Paul Guardian Insurance Co.* v. *Johnson*, 884 F.2d 881 (5th Cir. 1989); *St. Paul Mercury Insurance Co.* v. *Duke University*, 670 F. Supp. 630 (M.D.N.C. 1987), aff'd in part and rev'd in part, 849 F.2d 133 (4th Cir. 1988); *United Services Automobile Ass'n* v. *Cregor*, 617 F. Supp. 1053 (N.D. Ill. 1985); *Safeco Insurance Company of America* v. *Miller*, 591 F. Supp. 590 (D. Md. 1984). Indeed, suits such as this can be anticipated whenever a punitive damages judgment is entered, and "[a]wards of punitive damages are skyrocketing." *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2924 (1989) (O'Connor and Stevens, JJ., concurring in part and dissenting in part).

The due process limits on the states' power to subject nonresident defendants to personal jurisdiction guarantee fairness to litigants and safeguard the co-equal status of the states. The significant number of cases presenting personal jurisidiction issues that this Court has decided in recent years itself demonstrates the importance of these principles. The sweeping approach to specific jurisdiction adopted by the court below should not be permitted to take root without plenary consideration by this Court. The Court should grant the petition to resolve the conflict among the lower courts and to address the proper application of these principles to the present case.

II. THE KANSAS COURTS' CONCLUSION THAT THEY WERE ENTITLED TO APPLY KANSAS LAW IN DETERMINING WHETHER RESPONDENTS WERE OBLIGATED TO INDEMNIFY PLAYTEX FOR THE PUNITIVE DAMAGES AWARD SQUARELY CONFLICTS WITH THIS COURT'S DECISION IN *PHILLIPS PETROLEUM* v. *SHUTTS*

The adverse effects of the Kansas Supreme Court's overbroad conception of specific jurisdiction are not limited to the unfairness to Playtex and the unjustified intrusion upon the interests of other states. Having asserted jurisdiction, the Kansas court next decided which law to apply in adjudicating the contract dispute. Not surprisingly, the court placed its public policy thumb firmly on the scale and concluded that Kansas law applied.

This phenomenon is not unique to this case. All too often, a state court's expansive jurisdictional ruling leads inexorably to the application of that state's law. See *Rush*, 444 U.S. at 325 n.8; *Hanson*, 357 U.S. at 242-243. The fact that the forum will in most cases choose to apply its own law is yet another reason why states should not be permitted to assert specific jurisdiction on the basis of an attenuated relationship between the forum and the controversy.

Beyond that, the Kansas court's choice of law determination here constitutes independent constitutional error. The state court ignored the principles only recently set forth by this Court in *Phillips Petroleum Co.* v. *Shutts*, *supra*, a case that involved a similar supra-expansive application of Kansas law. The Court should grant the petition for a writ of certiorari with respect to this issue in order to further elucidate the principles established in *Shutts*.

To begin with, the Kansas Supreme Court's expressed rationale for its determination conflicts with this Court's decision in *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930). The state court stated that its choice of Kansas law rested solely on public policy grounds: "Kansas will not apply the law of another state on the instant issue of insurance and punitive damages in contravention of Kansas public policy." App., *infra*, 24a. But this Court held in *Dick* that a state's power to enforce its public policy is constrained by the same due process standard that generally limits a state's ability to apply its own law. Thus, in recognizing a state's power to implement its public policy, the Court cautioned that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." 281 U.S. at 410.[9]

A contrary rule would be absurd, allowing a state to circumvent the due process limits on its authority simply by characterizing the particular legal rule as one undergirded by important "public policy." Kansas' ability to implement its public policy thus turns entirely upon

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[9] The Kansas Supreme Court cited *Dick* for the opposite proposition (see App., *infra*, 18a), ignoring the clear limitation imposed by this Court upon a state's power to implement its own public policy. Of course, the Kansas court's interpretation is impossible to square with *Dick* itself, which held that the Constitution barred the forum from applying its own law.

whether the Due Process Clause permits Kansas to apply its own law to this contract dispute.

Although the Kansas court did not undertake the latter inquiry, it is clear that the governing due process principle bars the application of Kansas law to the substantive contract law issues in this case. The relevant inquiry proceeds in two stages. First, it is necessary to "determine whether Kansas law conflicts in any material way with any other law which could apply." *Shutts*, 472 U.S. at 816. The Kansas rule barring enforcement of insurance policies providing indemnification for punitive damages awards is the minority rule among the states. Schumaier & McKinsey, *The Insurability of Punitive Damages*, 72 A.B.A.J. 68, 68 (March 1, 1986). One of the many states adhering to the majority rule that such contracts may be enforced is Delaware, which is Playtex's place of incorporation, the place of incorporation of one of respondent insurance companies, and the place where payment under the policies was to occur. See *Whalen* v. *On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986). There is thus a "true" conflict among the state laws that could possibly apply to this dispute.[10]

The second step in the inquiry is determining whether the forum has a sufficient connection with the claims. "Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each * * * plaintiff * * *, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-822 (quoting *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 312-

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[10] The Kansas Supreme Court observed that one of the other possibly applicable legal rules—the Illinois rule—also would bar Playtex from enforcing the indemnification obligation. App., *infra*, 16a. But the court ignored *Shutts*' injunction to canvass "*any* other law which could apply" (472 U.S. at 816 (emphasis added)) in order to determine whether there is a true conflict.

313 (1981) (plurality opinion)).[11] Here, as in *Shutts*, no such significant contacts are present.

This Court has considered the constitutional validity of a forum's decision to apply its own law in five cases involving insurance coverage disputes, all of them actions brought by the insured party against the insurance company. See *Allstate Insurance Co.*, *supra*; *Clay* v. *Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964); *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *John Hancock Mutual Life Insurance Co.* v. *Yates*, 299 U.S. 178 (1936); *Dick*, *supra*. While the different posture of these cases makes it impossible to construct a precise analogy, it is highly relevant that in all of the cases in which the forum's decision to apply its law was upheld, the policy beneficiary was a resident of the forum or at least was injured there. See *Allstate Insurance Co.*, 449 U.S. at 318-319 (plurality opinion); *Clay*, 377 U.S. at 182; *Watson*, 348 U.S. at 72; compare *Yates*, 299 U.S. at 180, 182 (insured's residence in forum not by itself sufficient to allow forum to apply its own law); *Dick*, 281 U.S. at 408 (forum barred from applying its law where insured not actually resident in forum). That significant contact is lacking in this case.

In addition, "[w]hen considering fairness in this context, an important element is the expectation of the parties." *Shutts*, 472 U.S. at 822. This Court has accorded considerable significance to the fact that a defendant insurance company did business in the forum and therefore had reason to expect that the forum's law would be applied to its policies. See *Allstate Insurance Co.*, 449 U.S. at 317-318 (plurality opinion); *Clay*, 377 U.S. at 182. Here, given the absence of any direct connection between the insurance contracts and Kansas, Playtex had abso-

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[11] This standard ensures compliance with the commands of both the Due Process Clause and the Full Faith and Credit Clause. *Shutts*, 472 U.S. at 819.

lutely no reason to anticipate that Kansas law would apply in the event of a coverage dispute. Kansas therefore may not apply its law over Playtex's objection. *Yates*, 299 U.S. at 182; *Dick*, 281 U.S. at 408.[12]

The Kansas Supreme Court stated that the fact that the dispute involved a punitive damages judgment entered under Kansas law gave Kansas an interest in barring enforcement of the insurance contract. App., *infra*, 17a, 20a-22a. But, as this Court recognized in *Shutts* (see 472 U.S. at 819-820), the existence of such a state interest in the absence of a direct contact between the forum and the transaction at issue (here, the insurance policies) is insufficient to justify the application of the forum's law.

The Kansas Supreme Court's clear error in applying this Court's precedents by itself justifies review of this aspect of the state court's decision. Plenary consideration of this issue will also give the Court an opportunity to apply the *Shutts* standard in a somewhat different context. In *Shutts*, there was absolutely no connection between Kansas and the non-Kansas oil and gas interests that were the subject of the litigation (472 U.S. at 822); the Court accordingly had no occasion to address the

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[12] The contracts themselves provide additional evidence of the parties' expectations. Playtex argued below that the provision of the contracts providing coverage of punitive damages awards "to the maximum extent permitted by law" was a choice of law rule directing the selection of the state law that would permit enforcement of the contract; there is considerable evidence supporting this view. See R. IX, pp. 79-80; R. X, p. 118; R. XI, pp. 17, 29. But the Kansas trial court refused to permit Playtex to develop the record fully with respect to this issue. It recognized that there were "numerous and extensive disputes of fact with respect to the construction of the policy and the expectations of the parties," yet it concluded that the disputed facts were "not material" to its decision, because in its view Kansas public policy was determinative of the choice of law issue. App., *infra*, 38a; see also *id.* at 22a-24a (decision of Kansas Supreme Court upholding the trial court's determination).

question whether even an extremely attenuated connection between the forum and the controversy gives the forum the constitutional authority to apply its own law. This case squarely presents that important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1989

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 62,795

ST. PAUL SURPLUS LINES INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, and AIU INSURANCE COMPANY,

Appellees,

v.

INTERNATIONAL PLAYTEX, INC., and PLAYTEX FAMILY PRODUCTS, INC.,

Appellants.

SYLLABUS BY THE COURT

1. K.S.A. 1988 Supp. 60-308(b), the Kansas long arm statute, is to be liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution.

2. When considering questions of personal jurisdiction, a two-step analysis is required. First, does the defendant's conduct fall within the scope of the relevant provision of the Kansas long arm statute? Second, does the exercise of personal jurisdiction in the particular case comply with the due process requirements of the Fourteenth Amendment?

3. There are three basic factors which must coincide if jurisdiction is to be entertained over a nonresident on

the basis of the transaction of business within the state. These are (1) the nonresident must purposefully do some act or consummate some transaction in the forum state; (2) the claim for relief must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice. Consideration is to be given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

4. The public policy of Kansas does not permit insurance coverage for punitive damages. Where an award of punitive damages is made in the State of Kansas pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages. A refusal to apply Kansas law on the issue of punitive damages would thwart the purposes for which the policy was adopted.

5. Personal jurisdiction is a question of law to be determined by the trial court.

6. Where a contract is found to be unambiguous, the written agreement determines the rights of the parties.

7. The burden on the party seeking summary judgment, K.S.A. 1988 Supp. 60-256, is a strict one. The appellate court scope of review in summary judgment cases is discussed and applied.

8. Under the facts of this case, our public policy analysis indicates that additional facts, yet to be discovered, which may suggest that Delaware law should be applied to this action are not relevant. Kansas will not apply the law of another state on the instant issue of insurance and punitive damages in contravention of Kansas public policy.

9. If a disputed fact, however resolved, could not affect the judgment, it is not a material fact so as to preclude summary judgment.

10. The function of the district court under K.S.A. 1988 Supp. 60-254(b) is to act as a dispatcher. The district court is to determine the appropriate time when each final decision in a multiple claims action is ready for appeal. The district court's discretion is to be exercised in the interest of sound judicial administration.

Appeal from Sedgwick district court; NICHOLAS W. KLEIN, judge. Opinion filed July 14, 1989. Affirmed.

Robert L. Howard, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Stephen M. Kerwick*, of the same firm, and *William J. McSherry, Jr.*, of Bryan, Cave, McPheters & McRoberts, of New York, New York, were with him on the briefs for appellant.

Philip L. Bowman, of Adams, Jones, Robinson and Malone, Chartered, of Wichita, argued the cause, and *Laura L. Ice*, of the same firm, and *Thomas P. Kane*, *Edward M. Laine*, *Bethany K. Culp*, and *Jonathon C. Bloomberg*, of Oppenheimer Wolff & Donnelly, of Saint Paul, Minnesota, were with him on the brief for appellee.

The opinion of the court was delivered by

SIX, J.: Defendants, International Playtex, Inc., and its successor in interest, Playtex Family Products, Inc., (referred to jointly as Playtex) appeal the trial court's holding that the public policy of the State of Kansas, as a matter of law, precludes Playtex from recovering $10,000,000 from its excess insurers, the plaintiffs herein. The judgment of $10,000,000 represents the amount of punitive damages assessed, in a products liability case, against International Playtex, Inc. *O'Gilvie v. Intern. Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985), *aff'd in part, rev'd in part* 821 F.2d 1438 (10th Cir. 1987), *cert. denied* —— U.S. ——, 100 L. Ed. 2d 601 (1988).

This declaratory judgment action involves horizontal federalism. We are required to review the relationship of Kansas to her sister states in the areas of personal jurisdiction and choice of law. The Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, section I, of the United States Constitution allocate power among the states to exercise personal jurisdiction and to apply state law.

The procedural vehicles of (1) partial summary judgment (K.S.A. 1988 Supp. 60-256) and (2) final judgment certification (K.S.A. 1988 Supp. 60-254[b]), exercised by the trial court in tandem, carry the appeal to this court. We find no error and affirm.

The specific issues for our review are: (1) Whether Playtex is subject to personal jurisdiction in Kansas; and (2) whether the trial court erred in (a) applying Kansas law to deny insurance coverage of the punitive damages award; (b) granting partial summary judgment; and (c) certifying the partial summary judgment as a final judgment pursuant to K.S.A. 1988 Supp. 60-254(b).

FACTS

Betty O'Gilvie died on April 2, 1983, of toxic shock syndrome. Her husband, Kelly O'Gilvie, brought an action against Playtex in the United States District Court for the District of Kansas. He alleged that the use of Platex super-deodorant tampons caused her death and, therefore, Playtex was liable under the Kansas law of strict liability in tort. The jury attributed 80 percent of the total fault to Playtex and 20 percent to Betty O'Gilvie's physician, who was not a party to the lawsuit. Actual damages of $1.525 million and $10 million in punitive damages were awarded. Judgment was entered against Playtex for 80 percent of the total amount of the actual damages. The federal district judge granted a remittitur reducing the punitive damage award to $1.35 million

based upon Playtex's agreement to remove certain types of the product from the market and to enhance the product's warning. 609 F. Supp. at 819.

Both parties appealed. The Court of Appeals for the Tenth Circuit affirmed the jury verdict against Playtex, but reversed the punitive damage remittitur. 821 F.2d at 1450. Playtex's petition for *certiorari* was denied.

The punitive award of $10,000,000 and interest of approximately $3,500,000 has been paid by Playtex.

Playtex's excess insurers sought a declaration from the trial court that: (1) they are not obligated to indemnify Playtex for the punitive damages in the *O'Gilvie* action, and (2) they are obligated to pay only the costs of the federal court appeal attributable to the compensatory damage award.

Shortly after two of the insurers filed this action in Kansas, Playtex brought a similar action against the insurers in Delaware. *Playtex Family Products, Inc. v. St. Paul Surplus Lines Insurance Company*, case No. 88C-FE-166, Superior Court of Delaware, New Castle County. Subsequently, the pleadings in this action were amended to include the same parties. Playtex contends that the law of Delaware should apply because Delaware is the state where the tampons were manufactured and Delaware is Playtex's principal place of business. The insurers moved for a stay of the Delaware proceedings pending the outcome of the Kansas action. The insurers anticipated that Playtex would contest Kansas jurisdiction and, consequently, also filed suit in Minnesota, where the policy of the lead carrier was issued. The Minnesota action has been voluntarily stayed in deference to this case.

The trial court ruled that it had both subject matter and personal jurisdiction over Playtex and that Kansas law should be applied to determine the outcome of the controversy. The trial court held that, because public policy of the State of Kansas prohibits a wrongdoer from

passing on the payment of punitive damage awards to insurance carriers, the plaintiff insurers are not obligated to indemnify Playtex for the punitive damage award assessed against Playtex in the *O'Gilvie* action. The trial court certified the partial summary judgment in favor of the insurers as a final judgment pursuant to K.S.A. 1988 Supp. 60-254.

On April 12, 1989, while this appeal was pending, the Superior Court of Delaware, New Castle County, Chandler, J., issued an opinion in case No. 88C-FE-166. The Delaware court addressed a motion by the insurers to dismiss based on res judicata, lack of ripeness, and failure to join indispensible parties. The Delaware court found that the question of the res judicata effect of the decision by the Kansas district court should be stayed pending our decision. The Delaware court dismissed the portion of Playtex's complaint seeking a declaration concerning the insurability of punitive damages and the application of Delaware law which might arise in cases other than *O'Gilvie*. We granted Playtex's Motion to include Judge Chandler's Opinion in the Record on Appeal in this action.

The Insurance Policies Involved

A summary of the insurance policies involved will provide background understanding for our analysis of the issues.

The policies do not contain any choice of law provision stating that the law of a specific state controls the resolution of coverage disputes.

International Playtex, Inc., and its successor in interest, Playtex Family Products, Inc., are subsidiaries of Esmark, Inc., the named insured on the policies at issue in this litigation. Esmark, Inc., contracted with the plaintiff insurance companies for excess comprehensive liability coverage for Esmark and its subsidiaries for the 1982 to 1983 policy year. Mission National Insurance Company

(Mission), which is not a party to this action, provided the first layer of excess coverage. Plaintiffs St. Paul Surplus Lines Insurance Company (St. Paul) and National Union Fire Insurance Company (National Union) provided the second layer of excess coverage on a pro rata basis.

The St. Paul policy was negotiated in California, issued in Minnesota, and delivered in Illinois. The National Union policy was issued in New York and delivered in Illinois, as was the plaintiff Granite State Insurance Company's (Granite State) policy.

National Union, Granite State, plaintiff International Insurance Company (International) and plaintiff AIU Insurance Company (AIU) shared the third layer of excess coverage on a pro rata basis. The International policy was negotiated and issued in California and delivered in Illinois. The AIU policy was negotiated, issued, and delivered in Illinois.

All the excess policies followed the terms of the Mission policy, which incorporated the terms of the underlying primary policy issued by Northwestern National Insurance Company.

When the verdict in the *O'Gilvie* action was rendered, Mission denied coverage for the punitive damage award and tendered payment for the compensatory award. Playtex rejected the tender and pursued its appeals. The coverage under the Mission policy was subsquently exhausted on other claims and Playtex notified the other excess carriers that it would expect those carriers to pay the punitive damage award and fund the *O'Gilvie* appeals.

Personal Jurisdiction

The trial court found that it had personal jurisdiction over Playtex pursuant to K.S.A. 1988 Supp. 60-308 (b)(1). In *Schlatter v. Mo-Comm Futures, Ltd.*, 233 Kan. 324, 333, 662 P.2d 553 (1983), this court said that

a trial court's determination that it had personal jurisdiction will be affirmed if there is personal jurisdiction under any of the provisions of the Kansas long arm statute (K.S.A. 1988 Supp. 60-308[b]). The plaintiffs (in this case, the insurers) carry the burden of proving the existence of personal jurisdiction over the defendant. 233 Kan. at 335.

We said in *Volt Delta Resources, Inc. v. Devine*, 241 Kan. 775, 777-79, 740 P.2d 1089 (1987):

> "The Kansas long arm statute is liberally construed to assert personal jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the Fourteenth Amendment to the U.S. Constitution.
>
> . . . .
>
> "[W]hen considering questions of personal jurisdiction, a two-step analysis is required. First, does the defendant's conduct fall within the scope of the relevant provision of the Kansas long arm statute? Second, does the exercise of personal jurisdiction in the particular case comply with the due process requirements of the Fourteenth Amendment as set out in the decisions of the United States Supreme Court?"

Playtex admitted in its answer to the amended petition for declaratory judgment that:

> "defendant IPI was a Delaware corporation until it was dissolved in December, 1986, that the parent corporation of IPI from October 1, 1982 to October 1, 1983 was Esmark, Inc. ('Esmark') which was at that time also a Delaware corporation and further . . . that at that time IPI and Esmark had their executive headquarters located in Stamford, Connecticut and Chicago, Illinois, respectively."

Playtex also admitted that, prior to its dissolution, IPI manufactured Playtex super deodorant tampons, which were sold and distributed throughout the United States, including the State of Kansas.

K.S.A. 1988 Supp. 60-308(b) provides, in part:

> "Any person, whether or not a citizen or resident of this state, who in person or through an agent or instrumentality does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts:
>
> "(1) Transaction of any business within this state."

K.S.A. 1988 Supp. 60-308(b)(1) was interpreted by this court in *White v. Goldthwaite*, 204 Kan. 83, 88, 460 P.2d 578 (1969):

> "From the foregoing cases it appears there are three basic factors which must coincide if jurisdiction is to be entertained over a nonresident on the basis of transaction of business within the state. These are (1) the nonresident must purposefully do some act or consummate some transaction in the forum state; (2) the claim for relief must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation . . . ."

The trial court relied on *United Services Auto. Ass'n v. Cregor*, 617 F. Supp. 1053 (N.D. Ill. 1985), which has also been cited by both parties. The Cregors had contracted with a Texas insurance company to insure their Illinois home. The Cregors moved to Hawaii. They also insured their Hawaii residence with the Texas company. They were subsequently sued for fraud and breach of

contract by the couple (the McNallys) who had purchased the Illinois residence. The Cregors tendered the defense of that lawsuit to the Texas insurer, who brought a declaratory judgment action to remove its responsibility to defend and to indemnify the Cregors. The Cregors argued that the Illinois court did not have personal jurisdiction over them in the declaratory judgment action because they were no longer Illinois residents. The Cregors contended that their Illinois contacts arose out of the fraud lawsuit and, therefore, were not sufficient to establish personal jurisdiction in the declaratory judgment case. The court did not agree.

> "This declaratory judgment action requires the Court to determine whether coverage exists to protect the Cregors in the McNally's underlying suit. If such coverage exists, it will flow from the policy which insured the Cregors' Wilmette, Illinois home. Consequently, if coverage exists under the policy, it will arise out of actions taken by the Cregors in relation to their Wilmette, Illinois home and the sale of it." 617 F. Supp. at 1055.

Playtex advances an argument similar to that of the Cregors. Playtex contends that, although the federal court in Kansas had jurisdiction over the original *O'Gilvie* action pursuant to K.S.A. 1988 Supp. 60-308(b)(7)(B) (product liability), jurisdiction cannot extend to a declaratory *contract* action where there was no connection with Kansas in the creation of the contract. The Cregors had been Illinois residents at the time the insurance contract was signed and the policy specifically insured Illinois property. The federal district court found that the Cregors had transacted business in Illinois. In the case at bar, none of the parties are Kansas residents and no business with regard to the negotiation of the insurance contracts was conducted in Kansas. Betty O'Gilvie, the insured risk, however, was located in Kansas.

Playtex argues that the current claim does not arise out of the use of its products sold in this state, but rather out of an insurance contract between nonresident corporations which have no connection to the State of Kansas.

K.S.A. 1988 Supp. 60-308(b) is to be liberally construed. It was not error for the trial court to find that the declaratory judgment action was sufficiently connected to the sale of Playtex products in Kansas to warrant personal jurisdiction over Playtex. The declaratory judgment action requires us to determine whether coverage for punitive damages exists to protect Playtex in the underlying *O'Gilvie* damage action. The question of coverage arises from the actions taken by Playtex in selling its product in Kansas, which subsequently caused the death of a Kansas resident. The plaintiff insurers' claim for an insurance coverage determination lies in the wake of the commercial activities of Playtex in Kansas. As the Tenth Circuit observed in *O'Gilvie*:

> "Punitive damages are imposed under Kansas law for 'a willful and wanton invasion of the injured party's rights, the purpose being to restrain and deter others from the commission of like wrongs.' *Wooderson* [v. *Ortho Pharmaceutical Corp.*, 235 Kan. 387,] 681 P.2d [1038,] at 1061 [, *cert. denied* 469 U.S. 965 (1984)] (quoting *Cantrell v. Amarillo Hardware Co.*, 226 Kan. 681, 686, 602 P.2d 1326, 1331 (1979))." *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1446 (10th Cir. 1987).

The punitive damage award resulted from the application of Kansas law.

Although no activity took place in Kansas with regard to the formation of the insurance contracts, the parties anticipated that claims under the policies might arise in the State of Kansas. The automobile liability portion of the insurance policies includes endorsements to comply with the requirements of the Kansas Automobile Injury

Reparations Act (K.S.A. 40-3101 *et seq.*) and the Kansas Financial Security Act (K.S.A. 1988 Supp. 40-3104[a]). The policies contain a number of provisions designed to comply with various insurance laws and regulations of many different states.

Playtex knew that its tampons were distributed in Kansas. There was a product liability risk under the insurance policies arising from the sale of Playtex tampons in Kansas.

Playtex cites *Land Manufacturing, Inc. v. Highland Park State Bank*, 205 Kan. 526, 470 P.2d 782 (1970), in support of its argument that there is not a sufficient connection between the business activities of Playtex in Kansas and the insurers' declaratory judgment claim. In *Land Manufacturing*, the plaintiff had recovered a default judgment against the defendant, Highland Park State Bank. A year later, the plaintiff instituted garnishment proceedings against Chase Manhattan Bank based on the default judgment. Chase Manhattan argued that the district court lacked personal jurisdiction over it. Although Chase was transacting business in Kansas, its business activities in Kansas were unrelated to the underlying dispute between Land Manufacturing and Highland Park State Bank. In the instant action, if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurers.

Playtex asserts that in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984), the United States Supreme Court held that contractual activities in a state that would be sufficient to create jurisdiction in a contract action are insufficient to create jurisdiction in an unrelated tort action. *Helicopteros* was a wrongful death action which arose out of a helicopter crash in Peru. Four United States citizens who were employees of a Houston-based company working on a pipeline project in Peru were killed in the

crash. The representatives of the decedents brought suit in Texas against the company owning the helicopter.

Playtex's reliance on *Helicopteros* is misplaced.

The Court in *Helicopteros* did not find that the contractual activities of Helicol would be sufficient to subject Helicol to jurisdiction in a contract action. The Court noted that some negotiations on the contract were conducted in Houston, but that the contract was signed in Peru, was written in Spanish, and stated that any controversies arising out of the contract would be submitted to the jurisdiction of the Peruvian court. All the parties in the case conceded that their claims against Helicol did not arise out of, or were they related to, Helicol's activities in Texas.

> "Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." 466 U.S. at 414.

Playtex also cites *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987). In *Asahi*, a California resident brought a product liability action in California against the manufacturer of a tire tube. The plaintiff had been severely injured and his wife killed in a motorcycle accident. He alleged the accident occurred because of a sudden loss of air and explosion in the rear tire of the motorcycle brought on by a defective tire, tube, and sealant. Cheng Shin Rubber Industrial Co., Ltd., the Taiwanese tube manufacturer, filed a cross-complaint against Asahi, the Japanese manufacturer of the tube's valve assembly. The plaintiff ultimately settled with Cheng Shin, leaving only the issue of indemnification between Cheng Shin and Asahi. Asahi's sales of tire valve assemblies to Cheng Shin took place in Taiwan.

The United States Supreme Court found that the mere act of placing a product into the stream of commerce was not sufficient to support a finding that Asahi had purposefully directed its actions toward the State of California. The court addressed the issue of California's interest in the contract indemnification claim:

> "The Supreme Court of California argued that the State had an interest in 'protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards.' [Citation omitted.] The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards. Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan." 480 U.S. at 114-15.

The facts in *Asahi* and the language of the opinion characterize it as an international case involving a choice of an inconvenient forum by Cheng Shin in which to assert its indemnification claim against Asahi.

In the present case, not only does Playtex have the requisite minimum contacts with the State of Kansas, but the State of Kansas has a significant policy interest justifying its assertion of personal jurisdiction over Playtex.

The public policy of Kansas does not permit insurance coverage of punitive damages. *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973); *Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co.*, 228 Kan. 532, 618 P.2d 1195 (1980). There was no such overriding California public policy concern in the indemnification claim between Asahi and Cheng Shin.

Where an award of punitive damages is made in Kansas, pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages.

Playtex purposefully advertised and sold its tampons in Kansas. Playtex initiated the interstate activity giving rise to the insurers' declaratory judgment claim. Playtex profited from its activity in Kansas. Playtex had fair warning that it might be subject to suit in Kansas. In fact, Playtex has already defended itself in a lawsuit arising from these facts in Kansas.

> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum [citation omitted], and the litigation results from alleged injuries that 'arise out of or relate to' those activities [citation omitted]." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

Playtex possessed certain minimum contacts with Kansas, so that it was " 'reasonable and just, according to our traditional conception of fair play and substantial justice,' " for Kansas to exercise personal jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807, 86 L. Ed. 2d 628, 105 S.Ct. 2965 (1985).

The trial court had personal jurisdiction over Playtex in this action.

2. *Choice of Law*

Playtex advances *Simms v. Metropolitan Life Ins. Co.*, 9 Kan. App. 2d 640, 685 P.2d 321 (1984), to support its argument that the trial court erred in applying Kansas law to an extraterritorial insurance contract. In *Simms*, the plaintiff, a Kansas resident, received group health

insurance through her employer, headquartered in Tennessee. The group policy had been delivered to the employer in Tennessee. The employer distributed certificates of coverage to its employees. A dispute arose between the plaintiff and the insurer over coverage for alcohol rehabilitation of her dependent son. The policy provided for limited coverage for such care. The applicable Kansas statute mandated broader coverage.

The Court of Appeals said, "Although the statute does not state its intended geographic reach, we cannot conceive that the legislature intended to attempt to regulate insurance contracts made outside this state." 9 Kan. App. 2d at 642. The court discussed Kansas choice of law principles for the construction of contracts and determined that the law of the state where the contract is made controls construction. *Simms* also stated that a contract is made when the last act necessary for its formation is completed. The law of the state where the master policy is delivered governs where a group insurance policy is involved. 9 Kan. App. 2d at 644.

The insurers in the instant case argue that *Simms* is distinguishable because it involved a legislative enactment, not a general public policy prohibition. Even if *Simms* were applicable to the facts in this case, Playtex's choice of law position is not strengthened. Playtex seeks to have Delaware law govern the instant insurance contracts because Delaware allows insurance for punitive damages. *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986). If, however, *Simms* controls the choice of law issue, Illinois law would govern the interpretation of the insurance contracts. Not only were the policies delivered to Playtex's parent corporation, Esmark, in Illinois, but also other substantial activity in the formation of the contracts occurred there. Illinois public policy prohibits insurance against liability for punitive damages arising out of the insured's misconduct. *Beaver v. Country Mutual Insurance Co.*, 95 Ill. App. 3d 1122, 1125, 420 N.E. 2d 1058 (1981).

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 816, the United States Supreme Court stated: "There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit."

The Plaintiff in *Barbour v. Campbell*, 101 Kan. 616, 168 Pac. 879 (1917), sued for breach of an oral promise. The contract had been made in Idaho, where it was enforceable under the statute of frauds. The contract, however, was not enforceable under the Kansas statute of frauds. The court said:

> "Ordinarily a contract which is valid where made is valid everywhere, but there is a well-known exception to that rule. Briefly stated, the exception is that where the contract contravenes the settled public policy of the state whose tribunal is invoked to enforce the contract, an action on that contract will not be entertained." 101 Kan. at 617.

See *Dow Chemical Corp. v. Weevil-Cide Co., Inc.*, 630 F. Supp. 125 (D. Kan. 1986); *Dickson v. Hoffman*, 305 F. Supp. 1040 (D. Kan. 1969).

Certain states have now abandoned the *lex loci* rule in favor of the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws § 188 (1969). See, *e.g.*, *Amer. Home Assur. v. Safway Steel Prod.*, 743 S.W.2d 693 (Tex. App. 1987); *Crown Center v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348 (Mo. App. 1986).

We reserve consideration of the Restatement's "most significant relationship" test for a later day. Our choice of Kansas law rests on Kansas public policy. The interest of Kansas exceeds Delaware's interest in the resolution of the instant controversy.

Playtex relies upon opinions of the United States Supreme Court in support of its argument that the interests

of other states outweigh the interests of Kansas in this litigation. Our review of the controlling choice of law cases supports the application of Kansas law in the instant case.

Home Ins. Co. v. Dick, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338 (1930), held that Texas law could not apply to an insurance policy between a Texas citizen and a Mexican insurer. However, the court specifically found that at all relevant times the insured was living in Mexico, and the boat which was insured was in Mexican waters at all times, including the time of the accident. No acts relating to the negotiation or performance of the insurance policy occurred in Texas. The Court said, "Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and under some circumstances, it may refuse to aid in the enforcement of such rights." 281 U.S. at 410.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 66 L. Ed. 2d 521, 101 S. Ct. 633 (1981), involved a Wisconsin auto accident between two Wisconsin residents. The accident occurred in Pierce County, Wisconsin, which is close to the border of Minnesota. The insured/decedent lived in Wisconsin, but worked in Minnesota. He was not traveling to work at the time of the accident. His wife, as personal representative of his estate, brought an action in Minnesota against his insurer. Shortly after the accident, the wife had moved to Minnesota. Minnesota law permitted stacking of uninsured motorist benefits; Wisconsin law did not. The Court found that the choice of Minnesota law by the Minnesota court did not violate the Due Process Clause or the Full Faith and Credit Clause. 449 U.S. at 320.

Allstate endorses the choice of Kansas law in the current dispute.

Playtex argues that the application of Kansas law to the insurance policies in question would frustrate the

intent of the parties. The clause of the insurance contract which is at issue states the following:

> "IT IS THE INTENTION OF THE COMANY [*sic*] AND THE NAMED INSURED THAT PUNITIVE AND EXEMPLARY DAMAGES BE FULLY INSURED TO THE MAXIMUM EXTENT PERMITTED BY LAW SUBJECT TO THE LIMITS OF LIABILITY AS SET FORTH UNDER SECTION III OF THIS POLICY." (Mission National Insurance Co. general condition "S.")

The wording of the Playtex policy is not ambiguous. The clause regarding punitive damage states that such damages will be covered to the extent permitted by law. One of the trial court's findings of fact was:

> "39. The second layer excess carriers have denied coverage for punitive damages only in those situations where the bodily injury or death occurred in a state where punitive damages are uninsurable as a matter of public policy."

The Playtex coverage was designed to insure a number of possible risks throughout the United States, including those in the State of Kansas. The provisions of the policies which are designed to comply with the various automobile insurance requirements of different states, including Kansas, indicate that the parties intended the policies to have effect wherever liability might arise. "Whether an ambiguity exists in a written instrument is a question of law to be decided by the court." *Kennedy & Mitchell, Inc. v. Anadarko Prod. Co.*, 243 Kan. 130, 133, 754 P.2d 803 (1988).

Where a contract is found to be unambiguous, the written agreement determines the rights of the parties. *Kennedy*, 243 Kan. at 135. The insurance policies involved were not ambiguous. It was not necessary for the trial court to consider additional evidence in construing the meaning of the contract.

In its reply brief, Playtex emphasizes the fact that the present case is an action for a declaratory judgment, not a direct action to enforce an insurance contract. Playtex argues that it has paid the punitive award as a result of the *O'Gilvie* judgment and does not seek to enforce the insurance contract in Kansas. Playtex reasons that, because it has already paid the punitive damages, the insurers are now obligated to indemnify Playtex in its state of incorporation, Delaware. The punitive damages, however, were awarded by a federal court in Kansas, pursuant to Kansas law, to a Kansas citizen, to punish conduct that occurred in Kansas.

In *Crown Center v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348, the insurers brought a declaratory judgment action to determine which of the insurers had the duty to defend Hyatt Corporation for claims arising out of the collapse of the skywalks at the Hyatt Regency Crown Center. Two of the insurers argued that Illinois law should apply because both the insurance companies and Hyatt Corporation were Illinois corporations and the insurance contracts were made in Illinois. The Missouri Supreme Court held that the law of the state in which the insured risk was located should control. 716 S.W.2d at 359.

In the Playtex companion Delaware action, the Delaware court refused to make a finding that Delaware law, not the law of the state where Playtex's activities caused injury, would control in determining who should pay punitive damages. The Delaware court also noted that Delaware has adopted the choice of law approach of the Restatement (Second) of Conflict of Laws § 188.

If we were to refuse to apply Kansas law on the issue of punitive damages, we would thwart the purposes for which the policy was adopted.

> "Where exemplary damages are awarded for purposes of punishment and deterrence, as is true in this

> state, public policy should require that payment rest ultimately as well as nominally on the party who committed the wrong; otherwise they would often serve no useful purpose. The objective to be attained in imposing punitive damages is to make the culprit feel the pecuniary punch, not his guiltless guarantor." *Koch v. Merchants Mutual Bonding Co.*, 211 Kan. at 405.

The objective of the policy is to prevent wrongful acts against citizens of the State of Kansas. Here, a Kansas citizen died as a result of the misconduct of Playtex. The jury in the *O'Gilvie* case made the following specific findings:

> "8. Did International Playtex know, or should it have known, of the increased risk of developing toxic shock syndrome when using Playtex super deodorant tampons at the time of the death of Betty O'Gilvie?
>
> "Yes X No ___
>
> "9. Was the failure of International Playtex to adequately warn about the increased risk of toxic shock syndrome with the usage of Playtex super deodorant tampons a reckless disregard by International Playtex of the consequences of its acts?
>
> "Yes X No ___" 609 F. Supp. at 818.

A finding that Kansas public policy does not apply to the punitive damages in the *O'Gilvie* action would effectively excuse Playtex from the consequences of its reckless behavior within this state. Failure to apply Kansas law would establish an undesirable precedent for other tort and product liability actions. In any product liability action which involves an out-of-state manufacturer, the manufacturer could avoid the application of Kansas public policy where the manufacturer had contracted outside the State of Kansas for insurance of punitive damages. This would result in the uneven application of the public

policy. Kansas tortfeasors would be required to feel the "pecuniary punch" while out-of-state tortfeasors could require their "guiltless" insurance companies to pay such damages. Out-of-state tortfeasors who contracted with out-of-state carriers would, therefore, not be subject to deterrence for committing reckless acts in Kansas.

We affirm the trial court's choice of Kansas law.

Partial Summary Judgment

The trial court sustained the plaintiff insurers' motion for partial summary judgment. A prologue to any analysis of a summary judgment issue is the recitation and acknowledgment of the movant's burden and of our scope of appellate review.

> "The burden on the party seeking summary judgment is a strict one. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. On appeal we apply the same rule, and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citation omitted]. The party opposing summary judgment, however, has the affirmative duty to come forward with facts to support its claim, although it is not required to prove its case. [Citations omitted]. If factual issues do exist, they must be material to the case to preclude summary judgment." *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 306-07, 756 P.2d 416 (1988).

Playtex points to "numerous controverted facts" connecting the parties to the State of Delaware. The trial court found that Playtex's Delaware assertions were not material to its decision. Personal jurisdiction is a question of law to be determined by the trial court. Our analysis of the personal jurisdiction issue indicates that the

record established a sufficient nexus between the State of Kansas and Playtex to permit the assertion of personal jurisdiction over Playtex. Whatever ties Playtex has to Delaware are noted, analyzed, and characterized as secondary to the issue of the personal jurisdiction of Playtex in the Kansas courts.

Playtex contends that summary judgment was improper because factual issues regarding the intentions of the parties as to the meaning of the punitive damage clause of the insurance policies were in dispute. A reading of Playtex's answer to the motion for partial summary judgment indicates that most of the insurers' contentions of fact were uncontroverted by Playtex. The trial court specifically found that the contraventions of fact made by Playtex were not material to the issues to be determined in the partial summary judgment. A review of the record supports the trial court's ruling.

The insurance contracts in issue stated that punitive damages would be insured to the maximum extent allowed by law. Kansas law prohibits the insurance of punitive damages; therefore, under the express terms of the contract, punitive damages arising out of Kansas litigation would not be covered.

In its journal entry of partial summary judgment, the trial court said:

> "This controversy arises out of injuries in Kansas suffered by a Kansas resident resulting in her wrongful death. Providing for the award of punitive damages in civil actions is a significant method by which this state protects its citizens. This state's interest in protecting its citizens and its duty to protect its citizens is of the highest order. This interest would be undermined if Kansas law were not applied to the question presented in this action."

The analysis of the choice of law issue also indicates that the trial court had sufficient facts to determine that

Kansas law should apply to the litigation. Playtex indicates that, had it been able to complete its discovery, it could have shown that the choice of Delaware law was the proper choice in this litigation.

This court has held that, ordinarily, a motion for summary judgment should not be sustained so long as discovery is incomplete. *Beck v. Kansas Adult Authority*, 241 Kan. 13, 26-27, 735 P.2d 222 (1987).

Our public policy analysis indicates that additional facts, yet to be discovered, which may suggest that Delaware law should be applied to this action are not relevant. Kansas will not apply the law of another state on the instant issue of insurance and punitive damages in contravention of Kansas public policy. "If a disputed fact, however resolved, could not affect the judgment it is not a material fact so as to preclude summary judgment." *In re Estate of Messenger*, 208 Kan. 763, Syl. ¶ 4, 494 P.2d 1107 (1972).

A Final Judgment Subject to Appeal

K.S.A. 1988 Supp. 60-254(b) states:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim or third-party claim or, when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The trial court specifically found that the issues relating to the liability for punitive damages were unrelated to the remaining issues in this litigation and certified the ruling on the motion for partial summary judgment as a final judgment under K.S.A. 1988 Supp. 60-254.

The plaintiff insurers' second claim for relief, which has not yet been adjudicated, seeks a declaration that the

insurers are liable for the expenses of the appeal of the *O'Gilvie* action only to the extent that they challenged the award of compensatory damages.

A certification pursuant to K.S.A. 1988 Supp. 60-254 (b) must contain an express determination that there is no just reason for delay and an express determination that the entry of judgment is a final judgment. *City of Salina v. Star B, Inc.*, 241 Kan. 692, 695, 739 P.2d 933 (1987). The trial court's entry of judgment met these two requirements. Because Fed. R. Civ. Proc. 54(b) is identical to K.S.A. 1988 Supp. 60-254(b), Kansas has followed the federal cases interpreting 54(b) certifications. 241 Kan. at 695.

Playtex contends the claim that remains below is between the same parties and predicated on the same insurance contracts; consequently, the trial court erred in certifying the partial summary judgment as a final judgment. Playtex cites *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 47 L. Ed. 2d 435, 96 S. Ct. 1202 (1976), in support of its contentions. In *Liberty*, the United States Supreme Court held that a 54(b) certification was improper where the plaintiff's complaint advanced a single legal theory which was applied to only one set of facts. 424 U.S. at 743.

In *Henderson v. Hassur*, 1 Kan. App. 2d 103, 562 P.2d 108 (1977), a number of claims, counterclaims, and cross-claims were asserted out of a contract for the building and operation of Pizza Hut franchises in Mexico. The trial court granted partial summary judgment on some of the claims, but reserved the issues of punitive damages and cross-claims between the two plaintiffs. The Court of Appeals found that the trial court had not issued a 54(b) certificate as required by the statute. The court held that, even had the trial court issued the certificate, the remaining counterclaim was so closely related to the claims disposed of in the partial summary judgment that

disposition of both was required for a final decision. 1 Kan. App. 2d at 111.

The issue of whether the insurers were liable for punitive damages is intertwined with the issue of whether the insurers would be required to fund the appeal from those punitive damages. The insurers argue, "The resolution of this issue and certification of the appeal has served to expedite the conclusion of this dispute and precluded the Defendants from relitigating this issue and undermining the public policy of this state in the Delaware action." We agree.

The insurers cite *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 64 L. Ed. 2d 1, 100 S. Ct. 1460 (1980). In *Curtiss-Wright* the Supreme Court granted *certiorari* in order to examine the use of 54(b) as a procedural device:

> "The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such judicial concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is 'the one most likely to be familiar with the case and with any justifiable reasons for delay.' [Citation omitted.] The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable." 446 U.S. at 10.

The Court in *Curtiss-Wright* endorsed its observation made in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435, 100 L. Ed. 1297, 76 S. Ct. 895 (1956), that the function of the district court under the Rule is to act as "dispatcher." The district court is to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. The district court's

discretion is to be exercised " 'in the interest of sound judicial administration.' " *Curtiss-Wright*, 446 U.S. at 8.

We adopt the *Curtiss-Wright* rationale as the correct one to invoke for a K.S.A. 1988 Supp. 60-254(b) determination.

Litigation on the same matters was pending in the state courts of Delaware and Minnesota at the time partial summary judgment was entered in this case. The concept of efficient judicial administration would be served by allowing this court to determine the personal jurisdiction and choice of law issues before the case advanced further. The Delaware court has indicated that it is waiting for this court's determination of the personal jurisdiction issue. The Minnesota action is stayed, pending this decision. Our adjudication of the issue of plaintiff insurers' nonliability for punitive damages will effectively dispose of the issue of the insurers' liability for the expenses of the federal court appeal of punitive damages.

Certification will not result in unnecessary appellate review.

The claims of jurisdiction and choice of law will not be mooted by any future developments in the case. This court will not have to decide these two issues more than once.

We agree with the observation of the insurers that any issues relating to the allocation of costs of the federal appeal are fact specific.

The Playtex Counterclaim—The Insurers' Motion

The insurers have advanced the argument that, because Playtex filed a counterclaim, characterized by Playtex as contingent, it waived jurisdiction.

The trial court specifically declined to decide or make any conclusions of law with respect to whether the coun-

terclaim is "a compulsory counterclaim, contingent counterclaim or whether it is a counterclaim at all."

The insurers have filed a motion to strike Appendix A of the Playtex brief and portions of the record on appeal, including arguments based thereon.

In view of our disposition of the appeal it is not necessary to consider either the "counterclaim question" or the insurers' motion.

Affirmed.

APPENDIX B

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

Case No. 88 C 463

ST. PAUL SURPLUS LINES INSURANCE COMPANY,
NATIONAL UNION FIRE INSURANCE COMPANY,
INTERNATIONAL INSURANCE COMPANY,
GRANITE STATE INSURANCE COMPANY,
and AIU INSURANCE COMPANY,
Plaintiffs,

vs.

INTERNATIONAL PLAYTEX, INC. and PLAYTEX
FAMILY PRODUCTS, INC.,
Defendants.

JOURNAL ENTRY OF PARTIAL SUMMARY JUDGMENT

This matter came on for hearing on June 2, 1988 at 9:00 a.m. on the motion of plaintiffs St. Paul Surplus Lines Insurance Company; National Union Fire Insurance Company, International Insurance Company, Granite State Insurance Company, and AIU Insurance Company for partial summary judgment. Philip L. Bowman and Teresa J. James, Adams, Jones, Robinson and Malone, Chartered, and Bethany K. Culp, Oppenheimer, Wolff & Donnelly, appeared on behalf of the plaintiffs.

Darrell W. Warta, and Stephen Kerwick, Foulston, Siefkin, Powers & Eberhardt, and William McSherry, Spengler, Carlson, Gubar, Drodsky & Frischling appeared on behalf of the defendants International Playtex, Inc. and Playtex Family Products, Inc.

This statement of the Court's Findings of Fact and Conclusions of Law is intended to comply with the Court's responsibility pursuant to K.S.A. 60-256, 60-254, and Kansas Rules of Civil Procedure 141 and 165.

FINDINGS OF FACT

1. The plaintiffs in the action *Kelly O'Gilvie, individually, and as Administrator of the Estate of Betty L. O'Gilvie, deceased; and Stephanie L. O'Gilvie, a minor, and Ken M. O'Gilvie, a minor, By and Through Kelly O'Gilvie, their father and natural guardian v. International Playtex, Inc.* established that Betty O'Gilvie died as a result of Toxic Shock Syndrome (TSS) caused by her use of International Playtex, Inc.'s (IPI) super absorbent tampons. In the Special Verdict Form, the jury unanimously and expressly found, that:

(a) Betty O'Gilvie's death was caused or contributed to by her use of IPI's super absorbent tampons;

(b) IPI's super absorbent tampons were more likely to cause TSS than IPI's competitors' tampons;

(c) the label and warning on IPI's tampon boxes failed to adequately warn users of the increased hazard assumed by usage of super absorbent tampons;

(d) IPI knew, or should have known, at the time of decedent's death, of the increased risk of developing TSS from the use of super absorbent tampons; and

(e) IPI's failure to warn women of this increased risk constituted a reckless disregard for the consequences of its acts.

O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987).

2. On February 11, 1988, Surplus Lines and National Union brought this action against IPI seeking a declaration that they, as IPI's insurers during the relevant policy

term, were not liable for the costs IPI incurred in its appeal of the punitive award in *O'Gilvie* or the $10 million punitive damage award. (Petition; Affidavit of Bethany K. Culp, ¶ 2.)

3. A courtesy copy of the Petition was sent to IPI's general cousel, Joel Coleman; however, the action was not served at that time because, as a courtesy, the insurers planned to await the outcome of the Supreme Court's ruling on the Writ of Certiorari. (Affidavit of Bethany K. Culp, ¶ 2).

4. The insurers anticipated that IPI would contest jurisdiction to avoid the application of Kansas law; therefore, they also filed suit in the state court of Minnesota where the policy issued by the lead carrier, St. Paul Surplus Lines, was issued. This action has been voluntarily stayed in deference to this action. (Affidavit of Bethany K. Culp. ¶ 3.)

5. On February 23, 1988, PFP, as the successor to IPI, instituted an action against the excess insurers in the Superior Court of Delaware, New Castle County, Case No. 88C-FE-166-1-CV. (Affidavit of Bethany K. Culp, ¶ 2.) Subsequently, both parties amended their initial pleadings to encompass the same parties. (See the Amended Petition, Exhibit D to the Affidavit of Bethany K. Culp, and the Amended Complaint, Exhibit E.)

6. On March 23, 1988, PFP and IPI filed a Motion for Summary Judgment in the Delaware action, alleging that no genuine material issues of fact remained for resolution. PFP and IPI have not filed briefs or affidavits in support of their Motion. (Exhibit F to the Affidavit of Bethany K. Culp, ¶ 4.)

7. On March 28, 1988, Plaintiffs filed a Motion in Delaware requesting dismissal, or in the alternative, a stay of the Delaware proceeding so that this previously commenced Kansas action could move forward properly and expeditiously. (Affidavit of Bethany K. Culp, ¶ 4.)

8. IPI was a subsidiary of the Named Insured, Esmark, Inc. ("Esmark".) (Affidavit of Richard G. Gustafson, ¶ 8.)

9. Esmark was incorporated in 1973 to act as a holding company for the businesses formerly operated as Swift & Company. (Exhibit A to Affidavit of Richard G. Gustafson, p. 1.)

10. Swift & Company manufactured and produced food, chemicals, and personal and industrial products. (Exhibit A to Gustafson Affidavit, p. 1.)

11. During 1983, the policy year at issue in this litigation, Esmark owned more than 20 subsidiaries including: IPI; Estech, Inc.; Eschem, Inc.; STP Corporation; Estronics, Inc.; Swift & Company; KBH Holding Company; Estech Investments, Inc.; Esmark International, Inc.; MSE, Inc.; DRE Interstate Aviation; Esmark Investments, Inc.; and Risk Resources, Ltd. (Exhibit A to Gustafson Affidavit, pp. 1-4.)

12. The subsidiaries of Esmark also had subsidiaries. Estronics, Inc., one of the Esmark subsidiaries, operated through four subsidiaries: International Jensen, Inc., EESCO, Inc., Patterson Dental Company, and Custom Technologies Corporation. (Exhibit A to Richard G. Gustafson Affidavit, pp. 2-3.)

13. Estech Investments, Inc., another Esmark subsidiary, operated through three subsidiaries: ESE, Inc., Radial Credit, and Walden Lake. (Exhibit A to Richard G. Gustafson Affidavit, p. 4.)

14. In mid-1982, Esmark applied for and received comprehensive general liability coverage for itself and its subsidiaries. (Affidavit of Richard G. Gustafson, ¶ 2.)

15. During the 1982-83 policy term Esmark's principal place of business was Chicago, Illinois. The principal places of business of Esmark's various subsidiaries and their subsidiaries included: Connecticut; Illinois; Texas;

and Minnesota. (PFP's and IPI's Answer to Interrogatory No. 3, attached as Exhibit H.)

16. In the Delaware action, IPI claims that Delaware is its principal place of business; however, in other litigation IPI has taken the position that its principal place of business is Stamford, Connecticut, where its corporate headquarters are located. (Paragraph 1 of Plaintiff's Amended Complaint; Exhibit E; *International Playtex, Inc. v. Tridan Corp.*, No. 84, Civ. 5794 (S.D.N.Y. 1987) attached as Exhibit J.)

17 During the 1982-83 policy term, Esmark had gross revenues of $3.6 billion. (Richard G. Gustafson Affidavit, ¶ 2.)

18. Esmark was one of the largest industrial manufacturing corporations in the Fortune 500. (Richard G. Gustafson Affidavit, ¶ 5.)

19. During the 1982-83 policy term, Esmark had manufacturing, distribution, and/or administrative facilities in all 50 states. (Plaintiff's Responses to Request for Admission No. 12, attached as Exhibit I.)

20. In 1983 IPI was only one of the more than 20 subsidiaries of Esmark. (Exhibit A to Richard G. Gustafson Affidavit, ¶¶ 1-4.) IPI manufactured and distributed a number of household and personal products and was subdivided into five specialty groups according to product line. (Exhibit A to Richard G. Gustafson Affidavit, p. 72.) The Family Products Division manufactured a number of products including: baby nursers, rubber gloves, and tampons. (Exhibit A to Richard G. Gustafson Affidavit, p. 72.) In 1982, IPI's revenues accounted for only 23% of Esmark's total revenue. (Exhibit A to Richard G. Gustafson Affidavit, p. 72.)

21. The sales from the Family Products Division accounted for only 4% of Esmark's total revenue. (Richard G. Gustafson Affidavit, p. 72.) The revenues from the sale of tampons reflected less than 2 % of Esmark's total revenues. (Richard G. Gustafson Affidavit, p. 72.)

22. In the Delaware action IPI has asserted that the law of the state where the tampons were manufactured should control the outcome of this dispute. (Exhibit E, ¶ 38.)

23. For the policy term October 1, 1982 through October 1, 1983, the Plaintiffs issued excess comprehensive general liability coverage to Esmark. (Exhibits to Amended Petition; Affidavit of Richard G. Gustafson, ¶ 2; Affidavit of Peter Kuchar, ¶ 2; Affidavit of George Vallone, ¶¶ 2 and 3; Affidavit of Robert Knowles, ¶¶ 2 and 3.)

24. For the policy term 1982-83, Mission provided the first excess layer of coverage. (Exhibit B to Amended Petition.)

25. Coverage for the second layer was provided on a pro rata basis by Surplus Lines and National Union, with total limits of $15,000,000 excess of underlying coverage. (Exhibits C and D Amended Petition.) National Union, International, Granite State, and AIU shared, on a pro rata basis, the third excess layer of coverage, with total limits of $25,000,000, excess of $29,000,000 of applicable underlying coverage. (Exhibits E, F, and G to Amended Petition.)

26. The St. Paul Surplus Lines' Coverage was negotiated on behalf of Esmark, Inc. by Dinner, Levison & Company (Fred S. James) from its office in San Francisco, California. Dinner, Levison & Company retained John Ireland & Company in Chicago, Illinois to arrange for the placement of the excess umbrella coverage. St. Paul Surplus Lines issued its policy in St. Paul, Minnesota and delivered it to John Ireland & Company in Illinois. (Affidavit of Richard G. Gustafson, ¶ 3.)

27. The policy issued to Esmark, Inc. by AIU was negotiated and written out of the company's regional office in Chicago. The policy was then delivered to the named insured, Esmark, Inc., in Chicago, Illinois. (Affidavit of Peter Kuchar, ¶ 2.)

28. The policies issued to Esmark, Inc. by National Union and Granite State, identified in the Plaintiff's Complaint, were issued in New York and delivered to the named insured, Esmark, Inc., in the State of Illinois. (Affidavit of George Vallone, ¶ 2.)

29. The decision to contest the liability of National Union; AIU; and Granite State for the award of punitive damages in the *O'Gilvie* action was made in New York. (Affidavit of George Vallone, ¶ 3.)

30. International Insurance Company Policy No. 520-021506-6 was issued in the State of California and delivered in the State of Illinois. No negotiations between International Insurance Company and the agents or representatives of the insured under the policy occurred in the State of Delaware. (Affidavit of Robert Knowles, ¶ 2.)

31. The International Insurance Company policy was negotiated and prepared by the Company's underwriting group in San Francisco, California and was issued and delivered to the named insured, Esmark, Inc., residing in the State of Illinois. (Affidavit of Robert Knowles, ¶ 3.)

32. With certain exceptions, relating to the limits and premiums, the third layer excess policies mirrored the terms of the second layer excess policies. (Exhibits E and F of Amended Petition.)

33. The second excess layer policies followed the terms of the first layer excess policy issued by Mission. (Exhibits C and D of Amended Petition.)

34. Insuring Agreement 1A of the Mission policy incorporated the terms and conditions of the underlying policy provided by Northwestern National Insurance Company ("Northwestern".) (Exhibit B to Amended Petition.)

35. All of Esmark's policies provided coverage for bodily injury claims arising out of products manufac-

tured, sold, or distributed by the named insured and its subsidiaries. (Exhibits A-F to Amended Petition.)

36. There was no special coverage under the plaintiff's policies for claims of TSS. The Mission policy did provide for a higher self insured retention (deductible) for claims of TSS. Due to the higher retained limit applicable to claims of TSS, the insureds actually had less coverage for these claims. (Affidavit of Richard G. Gustafson, ¶ 11; Exhibit A to Amended Petition; see also the Northwestern Policy attached to the Gustafson Affidavit as Exhibit C.)

37. As of February 29, 1988, a total of 133 claims involving TSS were reported to St. Paul Surplus Lines for the policy term October 1, 1982 - October 1, 1983. These claims are the result of alleged injuries in a number of states including: California; Texas; Oregon; Florida; Oklahoma; South Carolina; North Carolina; Maryland; Iowa; Illinois; Kansas; Ohio; Louisiana; Mississippi; Missouri; Virginia; New York; West Virgina; New Jersey; Utah; Washington; Indiana; and Nebraska. (Affidavit of Kristi E. Teigen, ¶ 2.)

38. At the time the verdict in the *O'Gilvie* action was rendered, the umbrella excess carrier, Mission National Insurance Company, had not yet exhausted its limits. Mission denied coverage for the punitive award and tendered International Playtex's share of the compensatory award. International Playtex rejected the tender and pursued the appeal without receiving the consent of the second layer excess carriers. (Affidavit of Kristi E. Teigen, ¶ 5.)

39. The second layer excess carriers have denied coverage for punitive damages only in those situations where the bodily injury or death occurred in a state where punitive damages are uninsurable as a matter of public policy. (Affidavit of Philip L. Bowman.)

40. The issues relating to the liability for the punitive damage award are totally separate and apart and unrelated to the remaining issues of the case. The remaining issues can easily go forward without becoming entangled in the legal or factual issues, if there are any, relating to the liability for punitive damages on the part of the plaintiff, so I find there is no just reason to delay and I direct the entry of final judgment on that claim.

This Court has reviewed the Defendants' Responses to the Statement of Uncontroverted Facts set forth in the Plaintiffs' Motion. The Court finds that those facts which the defendants state are "Generally Uncontroverted" are admitted because the explanations and qualifications put forth by the defendants do not actually controvert the facts as stated. These qualifications and explanations are not material to this Court's decision.

As to the defendants' contravention of certain facts this Court finds the following:

Uncontroverted Fact No. 5: The Court will strike the word "purported." The Court finds that defendants have not materially disputed Uncontroverted Fact No. 5.

Uncontroveretd Fact No. 16: Defendant Playtex's response on this issue is argumentative and does not directly deny Paragraph 16 asserted by plaintiffs. Defendants simply argue that a corporation can have two principal places of business, which appears to be a conclusion of law. The Court finds that the defendants have not materially controverted the facts set forth in Uncontroverted Fact No. 16.

Uncontroverted Fact No. 22: The Court finds that the defendants have not directly controverted the fact set forth in Paragraph 22; rather, defendants have listed argument, conclusions of law, and additional facts which support their argument that Delaware law should apply.

To the extent that plaintiff's Uncontroverted Fact No. 22 implies that the only basis for defendant's argument that Delaware law applies is the fact that the tampons were manufactured in Delaware, the court finds that No. 22 is successfully controverted.

Uncontroverted Fact No. 26: The Court finds that Defendants' Response does not controvert No. 26.

Uncontroverted Fact No. 32: The Court finds that the Defendants' Response is merely a paraphrase of Uncontroverted Fact No. 32.

Uncontroverted Fact No. 36: The Court finds that the Defendants' Response is merely a paraphrase of Uncontroverted Fact No. 36.

Uncontroverted Fact No. 38: The defendants contend that consent was not necessary but do not controvert the fact that no consent was obtained.

There are numerous and extensive disputes of fact with respect to the construction of the policy and the expectations of the parties. Those issues are the subject of discovery largely in the Delaware case, but also in the present action. These facts are not material to the court's decision.

CONCLUSIONS OF LAW

1. This Court concludes that it has jurisdiction of this matter and personal jurisdiction over the defendant International Playtex, Inc. and its successor, Playtex Family Products, Inc. pursuant to K.S.A. § 60-308(b)(1). In reaching this conclusion the Court expressly adopts the reasoning of the Federal District Court for the District of Illinois as set forth in *United Services Auto Association v. Cregor*, 617 F. Supp. 1053 (D. Ill. 1985), which also involved a declaratory judgment action instituted by an insurer against a nonresident insured. In adopting this reasoning this Court concludes

that this declaratory judgment action requires the Court to determine whether coverage exists for a $10 million punitive damage award rendered against International Playtex, Inc. in the underlying suit. As such, this action for declaratory relief is one which lies in the wake of the commercial activities by which the defendants submitted to the jurisdiction of the Kansas courts. This action for declaratory relief arises from and is connected with the business transacted by defendant IPI in the State of Kansas. This Court concludes that there is a sufficient connection between the business conducted by the defendants in this state and the controversy before the Court to meet the requirements of K.S.A. § 60-308 (b) (1).

2. This Court concludes that Kansas law should apply to determine the outcome of this dispute. It is a clearly expressed public policy of the State of Kansas that punitive damages for direct liability cannot be insured against. The punitive damage award in the *O'Gilvie* action was not based upon vicarious liability. So, even under Kansas law enacted after the actions giving rise to the award in the *O'Gilvie* decision, defendants could not recover their punitive damages from plaintiffs. This controversy arises out of injuries in Kansas suffered by a Kansas resident resulting in her wrongful death. Providing for the award of punitive damages in civil actions is a significant method by which this state protects its citizens. This state's interest in protecting its citizens and its duty to protect its citizens is of the highest order. This interest would be undermined if Kansas law were not applied to the question presented in this action.

3. It is against the public policy of the state of Kansas to allow the defendants to pass on the costs of a punitive damage award based upon IPI's direct liability to the plaintiffs. Therefore, plaintiffs are entitled to the relief requested in Paragraph 39 of their Amended Petition, that they are not obligated to indemnify the defendants for

the punitive damage award which was assessed by a Kansas jury against International Playtex, Inc. in the action, *Kelly M. O'Gilvie, individually, and as Administrator of the Estate of Betty O'Gilvie, deceased; and Stephanie L. O'Gilvie, a minor, and Kevin M. O'Gilvie, a minor, by and through Kelly M. O'Gilvie, their father and natural guardian* v. *International Playtex, Inc.*, Case No. 83-1846-K.

4. PFP and IPI made an oral motion to withdraw their counterclaim and plaintiffs opposed the motion. The court denies defendants' motion to withdraw the counterclaim. The court does not decide or make any conclusion of law with respect to whether this was a compulsory counterclaim, contingent counterclaim or whether it is a counterclaim at all.

WHEREUPON, counsel for plaintiffs requests certification of the Court's ruling as a final judgment pursuant to K.S.A. 60-254;

WHEREUPON, counsel for defendants objects to plaintiffs' request for certification and requests time to brief and make argument on that issue at a separate hearing;

WHEREUPON, the Court denies defendants' request for briefs, argument and a separate hearing on the issue of whether a final judgment should be entered.

THEREUPON, the Court overrules defendants' objection to entering judgment, and concludes pursuant to K.S.A. 60-254 that there is no just reason to delay entry of judgment on plaintiffs' claim in Paragraph 39 of their Amended Petition.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion For Partial Summary Judgment is sustained. This Court accordingly declares that plaintiffs are not obligated to indemnify defendant International Playtex, Inc. for the punitive damage award in the *O'Gilvie* action.

2. This Court expressly determines that there is no just reason for delay in entering a final judgment as set forth above and hereby expressly directs entry of final judgment as such.

/s/ Nicholas W. Klein
The HONORABLE NICHOLAS KLEIN

Approved:

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APPENDIX C

SUPREME COURT,)
) ss.
STATE OF KANSAS,)

Dist. Court No. 88 C 463

No. 88-62795-AS

[Filed Aug. 15, 1989]

The State of Kansas, to the District Court within and for the County of Sedgwick in the State of Kansas, Greeting:

WHEREAS, In a certain civil action lately pending before you, wherein St. Paul Surplus Lines Insurance Company, et al., plaintiffs, and International Playtex, Inc., et al., defendants, a judgment was rendered by you against the said Defendants from which judgment said Defendants prosecuted an appeal in the Supreme Court within and for the State of Kansas;

AND WHEREAS, at the April Session of the January Term of said Supreme Court, A.D. 1989, on consideration of the said appeal it was ordered and adjudged by the said Supreme Court that the judgment of the District Court be Affirmed, attested true copy opinion attached and that the said ———— recover against the said —— Dollars for ———— costs herein expended and have execution therefor.

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Supreme Court, according to law.

Costs

Fees of Clerk Supreme Court ...	$ Paid
Record	———
Transcript	———
Other costs	———
Total	$——

WITNESS my hand and the seal of said Supreme Court affixed hereto, at my office, in the City of Topeka, on the Aug. 14, 1989 day of ——————— A.D. 19—.

/s/ Lewis C. Carter
LEWIS C. CARTER
Clerk of the Supreme Court

Mandate Received by Clerk
Trial Judge Notified Date: ——

No. 89-749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION, PETITIONER

v.

ST. PAUL SURPLUS LINES INSURANCE CO., ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

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MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Product Liability Advisory Council, Inc. ("PLAC", the "Council"), pursuant to Rule 36.1 of the Court, respectfully requests leave to file the accompanying brief *amicus curiae* in support of the petition of Playtex Family Products Corporation (Playtex) for a writ of certiorari. Counsel for petitioner has consented to such filing, but counsel for respondents have not consented.

The Council is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Acts of 1983. Its principal purpose is the submission of appellate briefs, as friend of the court, in cases raising significant issues affecting substantive and procedural law in the area of product liability.

The members of the Council include sixty-six major manufacturers and distributors of industrial, professional and consumer products of all types.[1] In addition, the members of the Council, as major business entities, own and operate real and personal property of virtually every sort. These products, property and activities are frequently involved in litigation. In this arena, the members of the Council, by virtue of their resources, regularly find themselves cast as "target defendants" by claimants in quest of deep pockets from which to fund substantial punitive damage recoveries. The members of the Council are thus acutely sensitive to the plight of the petitioner in this case and have a very real stake in the proper resolution of the issues presented.

Petitioner here has been stripped of $10 million in insurance coverage. Such coverage had been purchased specifically to cover the risk of "potentially devastating" punitive damage awards, see *Browning-Ferris Industries, Inc.* v. *Kelso Disposal, Inc.*, 109 S.Ct. 2909, 2923 (1989) (Brennan and Marshall, JJ., concurring), and, in the words of the relevant policies, to "FULLY INSURE" that risk "TO THE MAXIMUM EX-

[1] The members of PLAC are listed in the Appendix.

TENT PERMITTED BY LAW." Pet. App. at 19a. This outcome depended ultimately on expansive and improper overreaching by a State which—driven to impose its "overriding" public policy notwithstanding due process constraints—espoused a version of "minimum contacts" so attenuated as to undermine the doctrine in any meaningful sense. Astutely seizing the tactical opportunity thus presented, the respondent insurance carriers in this case were able to avoid their own contractual obligations through a preemptive strike declaratory judgment action in a substantively sympathetic yet constitutionally illegitimate forum.

The members of the Council, who must confront "skyrocketing" punitive damage claims and awards, see, *e.g.*, *Browning-Ferris, supra* at 2924 (O'Connor and Stevens, JJ., concurring in part and dissenting in part), are directly affected and understandably alarmed by such a result. Should decisions such as that below become the norm, Council members and other punitive damage "target defendants" will constantly face the threat that their efforts to cope with and spread these risks, including insurance premiums "skyrocketing" in tandem with punitive damage exposure, may be avoided by the very carriers who have freely agreed, typically for handsome fees, to assume them.

A broader potential for mischief implicit in this approach concerns the members of the Council as immediately and directly as does this case's specific scenario in the punitive damage context. Such jurisdictional and choice-of-law overreaching, if allowed to gain further favor with state courts, will inevitably foster preemptive "races to the courthouse" in virtually all instances in which astute litigants discern an opportunity to manipulate the outcome of a controversy through preemptive forum shopping. As entities with potentially arguable contacts with many jurisdictions throughout the nation, the members of the Council have no interest in becoming constantly enmeshed in such multifront, multistate litigation battles which, in the words of one court, "would reward Pearl Harbor tactics at the expense of the Marquis of Queensberry rules."[2]

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[2] *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 479 F. Supp. 563, 568 (S.D.N.Y. 1979).

WHEREFORE, it is respectfully requested that PLAC be granted leave to file the attached brief *amicus curiae*.

Respectfully Submitted,

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December 13, 1989

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-749

PLAYTEX FAMILY PRODUCTS CORPORATION, PETITIONER

v.

ST. PAUL SURPLUS LINES INSURANCE CO., ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS*

Amicus respectfully refers the Court to the accompanying Motion for Leave to file the instant brief, *ante* at i-iii, which sets forth its interests and those of its members in this case.

STATEMENT

Amicus adopts in its entirety petitioner's Statement appearing at pages 2-6 of the petition and petitioner's statement of the Questions Presented to this Court for review. Additional facts upon which *amicus* urges grant of the petition are set forth as part of *amicus'* statement of Reasons for Granting the Petition, directly below.

REASONS FOR GRANTING THE PETITION

Both the nature of the error of the Supreme Court of Kansas and the factual posture of this case make it an ideal vehicle for this Court to examine and clarify certain key aspects of jurisdictional and choice of law due process in a manner which will obviate all-too-common misinterpretations of the type reflected in the decision below. *Amicus* fully supports the petitioner's arguments on all points, including the choice of law issue. This brief, however, confines its discussion to the jurisdictional aspects of the opinion below which warrant plenary review at this time.

In a series of decisions starting in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court painstakingly has refined the twin concepts of "minimum contacts" with the forum and "traditional notions of fair play and substantial justice," both of which must be satisfied in order to justify any exercise of personal jurisdiction over an out-of-state defendant under the Due Process Clause. Under Kansas' approach, however, the critical elements of jurisdictional due process are effectively nullified. Minimum contacts are not meaningfully related to the specific events and transactions at issue, but need only "lie in the wake" of a defendant's previous minimum contacts arising in connection with other litigation relevant to other issues and parties. This approach stretches both "minimum contacts" and "traditional notions of fair play and substantial justice" beyond the breaking point.

The Kansas court has confused choice of law principles with jurisdictional principles. Thus, the result was rationalized below by an assertedly "overriding" Kansas public policy interest in applying its own law to a particular controversy. Of course, this factor may, in an appropriate case, be relevant to the second "fair play and substantial justice" prong of the due process inquiry. See, *e.g.*, *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 114 (1987). However, the decision below quite obviously blurs the critical distinction between the two inquiries. Moreover, Kansas' approach ultimately ignores the difference between the State's choice-of-law-related policy preferences as to a particular controversy and the minimum contacts and fundamental fairness *vis-a-vis* both the parties and the

specific transaction at issue without which the State cannot constitutionally be a forum in the first place. See, *e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84, 98 (1978); *Hanson* v. *Denckla*, 357 U.S. 235, 254 (1958). Such slipshod reasoning, which is finding increasing favor among courts in certain States, not only jeopardizes the liberty interests of potential defendants, but portends serious interstate mischief fraught with grave consequences for our federal system.

Such an approach invites State court jurisdictional and choice-of-law overreaching in contentious substantive areas, as in this case. In such cases, the temptation to sidestep the requirements of due process in order to seize "policy" control of an issue may, as below, prove irresistible, or, in the words of the Kansas Supreme Court, "overriding." *Amicus* submits that this factor, which is characteristic of numerous other recent state court decisions, alone should militate decisively in favor of plenary review in this case.

In the present case, Kansas' overreaching has been turned to maximum advantage by a litigant's aggressive procedural tactics. Here, a preemptive strike declaratory judgment was successfully employed to shop for a forum which would permit insurance carriers to avoid their own contractual indemnity obligations. Finding an "overriding" interest in so doing, the courts of Kansas shielded this gambit behind the cloak of Kansas' "public policy." In the topsy-turvy environment of the preemptive strike declaratory judgment, an erroneous assumption of jurisdiction has ironically allowed the Due Process Clause, contrary to this Court's specific warning, to be wielded by an adroit litigant "as a territorial shield to avoid interstate obligations freely assumed." *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 474 (1984).

Kansas' approach not only encourages such tactics by parties in litigation, but raises the unwholesome prospect of States vying with one another as preemptive fora for each others' disputes. Combined with an "aggressive" utilization of the declaratory judgment remedy, the expansive jurisdictional

approach exemplified in this case would invite constant interstate "races to the courthouse" in virtually every major litigation with at least two available fora with significantly different views of their relevant "public policy." It would be difficult to imagine a situation more fundamentally subversive of the "orderly administration of the laws," *International Shoe, supra* at 317, which this Court has emphasized as a key objective of the Due Process Clause. *E.g., World-Wide Volkswagen, supra* at 294 (1980).

The present record clearly exemplifies each of these troubling developments. Moreover, it does so in a factual posture which is virtually guaranteed to crystallize both the issues for this Court's consideration and the meaning of this Court's resolution of them.

I. DUE PROCESS DOES NOT SUPPORT PERSONAL JURISDICTION OVER A CONTROVERSY WHICH MERELY "LIES IN THE WAKE" OF A DEFENDANT'S MINIMUM CONTACTS WITH A DIFFERENT LAWSUIT.

Kansas assumed jurisdiction to abrogate a contract made and to be performed elsewhere by out-of-state entities by means of a simple metaphor. The decision below held, without further explanation, that "minimum contacts" sufficient to satisfy due process are present if the lawsuit at issue merely "lies in the wake" of a prior controversy which was properly tried in the State. App. at 11a.[3] Despite its evocative literary quality, this approach cannot be squared at any level with this Court's decisions.[4]

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[3] Citations to "App." are to the Appendix to the Petition.

[4] The error into which this metaphorical "analysis" led Kansas has been trenchantly noted by one of this century's leading federal jurists:

> When discoursing on the arts or belles-lettres colorful language stimulates the imagination, beguiles one into useful symbolism and opens up the avenues to creative thought. But in the process of rationalizing legal conclusions and arriving at a sound and proper determination of questions of the interpretation of statutes, procedural rules and constitutional limitations, cliches and rhetorical devices generally miss the mark.

Eisen v. Carlyle & Jacquelin, 479 F.2d 1005, 1013 (2d Cir. 1973) (Medina, J.), *vacated and remanded on other grounds,* 417 U.S. 156 (1974).

Some clue to the content of the "lies in the wake" concept is provided by Kansas' only other apparent analysis of the purported "contacts" of the petitioner with the State:

> In the instant action, if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurer.

App. at 12a. This, of course, is fully consistent with the metaphor of an occurrence which "lies in the wake" of some prior event. However, as the image of an infinitely expanding wake itself suggests, the reach of this concept is ultimately without discernable bounds. The "lies in the wake" view of minimum contacts thus proves useless in general and unconstitutional on the specific facts of this case.

In fact, Kansas' acknowledgement of the purely "but for" character of its minimum contacts approach is fatal to its constitutionality. This Court has ruled time and again that purely fortuitous contacts with a state, even when those contacts are unquestionably "foreseeable" in character, will not sustain jurisdiction in themselves. There must be some more "purposeful" relation which, in order to support specific jurisdiction, must give rise in some substantively meaningful sense to the controversy at issue. *E.g., Asahi,* 480 U.S. at 112; *Worldwide Volkswagen,* 444 U.S. 296-97. This analysis is strongly reinforced by this Court's conclusion in *Rush v. Savchuk,* 444 U.S. 320, 329 (1980), to the effect that the contract insuring a risk involved in tort litigation cannot be bootstrapped into a jurisdictionally significant contact of any nature with such a lawsuit, regardless of any attenuated "cause in fact" scenario which may be hypothesized.

Lastly, *amicus* notes that Kansas' "but for" analysis, ostensibly claiming to discern the requisite "purposeful" relation on the facts of this case, is not only erroneous as a matter of constitutional law but wrong as a matter of fact. Granted, in this case an actual verdict in Kansas brought the parties into confrontation in their coverage dispute. However, the issue of punitive damage coverage, a pure matter of law, was present in the contract from the day it was executed. Thus, in another

case, this same issue could readily ripen into declaratory judgment litigation in the absence of any actual punitive damages claim anywhere. For example, if premium payments were adjusted based upon some agreed exposure criteria, and the insurer disclaimed punitive coverage, yet continued to count the possibility of such judgments as "exposure" justifying an increased premium, this dispute would readily support a declaratory judgment. If no claim had previously arisen in Kansas at the time of that suit, even under Kansas' criteria, there would not even be "minimum contacts", much less a "wake" of such contacts in which to find this dispute lying. Every issue determinative of the outcome of this lawsuit could thus arise and be determined in the absence of any actual Kansas injury or claim.

The foregoing hypothetical demonstrates that Kansas' "contacts" with the prior tort action are, in any meaningful constitutional sense, utterly unrelated to the purely legal question of contractual construction involving entirely non-Kansas parties and transactions which is the sole subject matter of the present lawsuit.[5] No Kansas policy interest in the outcome of that issue, however fervently expressed, can overcome the State's absolute lack of any recognized minimum contact with the parties or transaction in suit.

II. A STATE'S SELF-PROFESSED "PUBLIC POLICY" INTEREST IN THE SUBSTANTIVE OUTCOME OF A DISPUTE CANNOT OVERRIDE THE ABSENCE OF MINIMUM CONTACTS AND FUNDAMENTAL FAIRNESS PREREQUISITE TO THE ASSUMPTION OF SPECIFIC JURISDICTION CONSISTENT WITH DUE PROCESS.

The first step on the road to its second major error is reflected in the Kansas Supreme Court's analysis of the tasks before it:

> We are required to review the relationship of Kansas and her sister states in the areas of personal jurisdiction and

[5] Indeed, the litigation posited could arise in the context of a decision by an insured as to whether to establish any contact with a state in which it was not doing any business at all.

> choice of law. The Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, section I of the United States Constitution allocate power among the states to exercise personal jurisdiction and to apply state law.

App. at 4a. This description of the relevant due process concerns is fatally flawed. In addition to melding both jurisdiction and choice of law under the single banner of interstate federalism, the decision below utterly ignores an interest which is implicated in both analyses and is paramount as to personal jurisdiction—the personal liberty interest of the persons over whom jurisdiction is to be exercised.

This Court has left no doubt that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations,' " noting specifically that "although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause ...' " *Burger King*, 471 U.S. at 472, n 13, quoting *International Shoe*, 326 U.S. at 319, and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 n 10 (1982).

Kansas' initial failure even to recognize the ultimate due process liberty interest concern implicated in the case before it presages the short shrift given this consideration throughout the opinion, and also largely explains Kansas' acceptance of contacts merely lying "in the wake" of other contacts as an adequate basis upon which to assume jurisdiction.

The upshot is that what Kansas termed its "overriding" interest in applying its public policy to the issues in this case fatally distorted its minimum contacts approach. Even the strongest eagerness to vindicate its public policy cannot "override" a State's lack of requisite contacts with a defendant. To the contrary, "even if the forum state has a strong interest in applying its law to the controversy ... the Due Process Clause ... may ... divest the State of its power to render a valid judg-

ment." *World-Wide Volkswagen,* 444 U.S. at 294. See also *Hanson v. Denckla,* 357 U.S. at 251.

The adverse consequences of such an approach are magnified in the present instance by Kansas' virtually absolutist vision of the scope of its public policy prerogatives:

> No state should give effect to the law of another on principles of comity when the effect would be deleterious to the public policy of the forum state.

Head v. Platte County, Missouri, 242 Kan. 442, 749 P.2d 6, 9 (1988). Under such a view, the resolution of the jurisdictional issue in virtually every case will also resolve the choice of law question in favor of the forum. Despite its analytically separate nature, therefore, proper jurisdictional analysis has a practical "gate-keeping" role of immense significance to play in the choice of law area as well in order best to ensure a proper functioning of the federal system.

III. KANSAS' OVERLY EXPANSIVE JURISDICTIONAL APPROACH TO THIS CASE WOULD, IF GENERALLY ADOPTED, SERIOUSLY THREATEN THE "ORDERLY ADMINISTRATION OF THE LAWS" WHICH DUE PROCESS IS DESIGNED TO ENSURE.

"[T]he orderly administration of the laws," *World-Wide Volkswagen,* 444 U.S. at 294, within and among the several States is a primary concern which any exercise of jurisdiction must serve in order to comport with the Due Process Clause, as this Court has repeatedly emphasized. *E.g., International Shoe,* 326 U.S. at 317; *Hanson v. Denckla,* 357 U.S. at 250-51; *Asahi,* 480 U.S. at 113.

Little further comment on this factor is required. In the present case, astute litigants combined with an overreaching forum to void freely bargained and paid for contractual obligations. In this alliance, the litigant wielded the sword of a preemptive strike declaratory judgment, while the forum, eager to vindicate its "public policy," purported to shield this foray

behind the Due Process Clause. See *Burger King*, 471 U.S. at 474. If the events below were vindicated as a scenario for major interstate litigation, "races to the courthouse" will become the rule rather than the exception, and the States themselves will be all but invited to vie with one other as hospitable preemptive fora. Nothing more subversive of proper interstate relations within the context of the federal system could be imagined. This prospect alone should doom Kansas' exercise of jurisdiction here as incompatible with "traditional notions of fair play and substantial justice," even if minimum contacts were, arguendo, assumed.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE RESOLUTION OF THE ISSUES WHICH IT RAISES.

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16, n 10 (1984), this Court noted a series of basic issues affecting personal jurisdiction under the Due Process Clause which it declined to reach as not fairly presented in that case. As stated by the Court, these issues were:

> (1) Whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and
>
> (2) What sort of a tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists ...
>
> [(3) W]hether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to" but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

As is obvious, these issues are clearly encompassed in the questions presented by the instant petition. In addition, any exercise of jurisdiction here over the insurance contract action at issue must be based solely on the defendant's contacts which

sustained jurisdiction in the prior tort action. Therefore, the issues as to the nature of the relationship between the cause of action and the contacts on which jurisdiction is to be based could not be more clearly presented. Consideration of this issue is further enriched by numerous decisions of this Court over the years assessing due process as to both jurisdiction and choice of law in various insurance related contexts, see Petition at 12, 25 and cases cited, which supply an instructive body of analysis and doctrine upon which to draw.

The precise factual reach of minimum contacts — put colloquially, "how minimal can you get?" — is an issue which has engaged the courts and commentators ever since *International Shoe* ushered in the modern era in this field of constitutional doctrine. Petition at 17-22, *passim,* and authorities cited. The present record presents this issue, against the background of years of effort by this Court, other courts and commentators, in a factual posture which might fairly be termed "a law professor's dream of an examination question,"[6] because it clearly presents highly important jurisdictional and choice of law issues. This factor should both aid analysis and clarify the import of this Court's resolution of the issues presented. The factual pattern of the litigation below also concretely illustrates the damage to federalism concerns and the "orderly administration of the laws" among and between the States which an erroneous view of the jurisdictional constraints imposed by the Due Process Clause would foster. A better case in which to address these issues could hardly be found.

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[6] Prosser and Keeton, *The Law of Torts* § 43, p. 285 (1984 Ed.) (referring to *Palsgraf v. Long Island RR. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)).

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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December 13, 1989

APPENDIX

Member Companies of *Amicus Curiae*
Product Liability Advisory Council, Inc.
("PLAC")

American Home Products Corporation
American Telephone & Telegraph
Amoco Corporation
Anheuser-Busch Companies, Inc.
Automobile Importers of America
The Budd Company
Caterpillar, Inc.
Chrysler Corporation
Clark Material Handling Company
The Coleman Company, Inc.
Dana Corporation
John Deere & Co.
Defense Research Institute
Dow Chemical Company
Eaton Corporation
Exxon Corporation
Federal-Mogul Corporation
Fiat Auto U.S.A. and Ferrari, N.A.
Firestone Tire & Rubber Company
FMC Corporation
Ford Motor Company
Fruehauf Corporation
General Electric Company
General Motors Corporation
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc
Harnischfeger Industries
Honda North America, Inc.
Hyundai Motor America
Johnson Controls, Inc.
Joy Technologies, Inc.
Kawasaki Motors Corp., USA

Eli Lilly and Company
Merck & Co., Inc.
Miller Brewing Company
Mitsubishi Motor Sales of America
Monsanto Company
Motor Vehicle Manufacturers Association of the United States, Inc.
Navistar International Transportation Corp.
Nissan Motor Corporation, USA
Otis Elevator Company
Paccar, Inc.
Piper Aircraft Corporation
Playtex Family Products Corp.
Porsche Cars North America, Inc.
Procter & Gamble Company
RJR Nabisco, Inc.
Rockwell International
Saab-Scania of America, Inc.
Snap-On Tools Corporation
Squibb Corporation
Sturm, Ruger and Company
Subaru of America, Inc.
TRW, Inc.
Toyota Motor Sales, U.S.A., Ltd.
U-Haul International
Union Carbide Corporation
Unocal Corporation
U.S. Tobacco
USX Corporation
Volkswagen of America, Inc.
Volvo North America Corporation
Vulcan Materials
Jervis B. Webb Company
Westinghouse Elevator Company
Yamaha Motor Corporation, U.S.A.

No. 89-749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION,

Petitioner

v.

ST. PAUL SURPLUS LINES INSURANCE CO., et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Kansas courts properly assume personal jurisdiction over petitioner in an action to resolve the question whether punitive damages awarded to a Kansas resident in a Kansas court action are insurable where the punitive award is based upon petitioner's purposeful conduct in marketing and distributing its products in Kansas and where there is a direct and strong connection between petitioner's marketing and distribution activities and the action?

II. Did the Kansas courts properly apply Kansas law to an action to resolve the insurability of punitive damages awarded to a Kansas resident where Kansas public policy prohibiting the insurability of such an award does not conflict with any other law that could apply and where petitioner's significant contacts with Kansas created a Kansas state interest in this action such that the choice of Kansas law is neither arbitrary nor fundamentally unfair?

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Respondents, other than St. Paul Surplus Lines Insurance Co., are National Union Fire Insurance Co., International Insurance Co., Granite State Insurance Co., and AIU Insurance Co. Pursuant to Rule 28.1 of the Rules of this Court, respondents state that the parent, subsidiary, or affiliated corporations of each respondent are:

ST. PAUL SURPLUS LINES INSURANCE COMPANY

Parents: The St. Paul Companies, Inc.
St. Paul Fire and Marine Insurance Company
St. Paul Specialty Underwriting, Inc.

NATIONAL UNION FIRE INSURANCE COMPANY

Parent: American International Group, Inc.

INTERNATIONAL INSURANCE COMPANY

Parents: Xerox Corporation
Xerox Financial Services, Inc.
Crum and Forster Inc.

GRANITE STATE INSURANCE COMPANY

Parents: American International Group, Inc.
New Hampshire Insurance Co.

AIU INSURANCE COMPANY

Parent: American International Group, Inc.

Petitioner Playtex Family Products Corporation is the successor to International Playtex, Inc. and Playtex Family Products, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Kansas Supreme Court's Opinion in this case.

STATEMENT

Petitioner Playtex Family Products Corporation (Playtex) is a producer of consumer goods which it markets and sells throughout the United States, including Kansas. During 1982 and 1983,

respondents and others[1] insured petitioner under insurance policies issued to Esmark, Inc., the parent of Playtex's predecessor corporation.[2] Among other things, the comprehensive multi-risk policies covered bodily injury claims arising out of products manufactured, sold, or distributed by Esmark and its subsidiaries. The policies insured risks in all fifty states and specifically recognized that coverage questions may arise under and be governed by Kansas law. In fact, the underlying policy, the terms of which were incorporated into the excess policies, contains a Personal Injury Protection Endorsement applicable only in the State of Kansas. *St. Paul Surplus Lines*, 777 P.2d at 1265.

In 1983, Betty O'Gilvie, a Kansas resident, died from Toxic Shock Syndrome (TSS) caused by her use of Playtex Super Deodorant Tampons. O'Gilvie's husband subsequently brought a claim against Playtex in the United States District Court for the District of Kansas seeking compensatory and punitive damages. A jury awarded O'Gilvie $1,525,000 in compensatory damages and $10,000,000 in punitive damages. Playtex appealed.

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[1] Respondents provided the second and third layers of excess comprehensive general liability coverage to Esmark and its subsidiaries during the 1982-1983 policy year. The primary policy was issued by Northwestern Company. The first excess layer of coverage was provided Mission National Insurance. With limited exceptions, the excess policies incorporated the terms of the underlying policy. *St. Paul Surplus Lines, Ins. Co. v. International Playtex, Inc.*, 245 Kan. 258, 777 P.2d 1259, 1262-63 (Kan. 1989).

[2] During the relevant time period, Esmark was the parent company of International Playtex Incorporated, the predecessor to Playtex Family Products Corporation, petitioner in this proceeding. *St. Paul Surplus Lines*, 777 P.2d at 1262.

Upholding the jury's punitive damage award, the Tenth Circuit stated:

> Punitive damages are imposed under Kansas law for "a willful and wanton invasion of the injured party's rights, the purpose being to restrain and deter others from the commission of like wrongs." . . .
>
> [T]here is evidence that Playtex deliberately sought to profit from this situation by advertising the effectiveness of its high-absorbency tampons when it knew other manufacturers were reducing the absorbency of their products due to the evidence of a causal connection between high absorbency [sic] and toxic shock.

O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) (citations omitted).

After Playtex's insurers had incurred liability under the policy, respondents commenced this action in Kansas state court seeking, *inter alia*, a declaration that the O'Gilvie punitive damage award was not insurable.[3] On July 2, 1988, the District Court for Sedgwick County, Kansas, granted respondents' motion for partial summary judgment, ruling that it had personal jurisdiction over Playtex and that Kansas law prohibiting insurance of punitive awards applied to the dispute. *St. Paul*

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[3] Playtex suggests in its petition that this action represents an example of "forum shopping by preemptive strike." Petition for Writ of Certiorari at 6. However, respondents can hardly be accused of forum shopping by bringing this action in the jurisdiction in which the risk insured against actually occurred. Moreover, the Kansas State District Court expressly found in this case that

(footnote continues)

Surplus Lines Ins. Co. v. International Playtex, Inc., No. 88 C 463 (Sedgwick County, Kansas, District Court 1988) (hereinafter "Trial Court Op."), *reprinted in* Petition for Writ of Certiorari at 29a *et seq*. In so ruling, the Court expressly found that "this controversy arises out of injuries in Kansas suffered by a Kansas resident resulting in her wrongful death." Trial Court Op., Conclusions of Law at ¶ 2, *reprinted in* Petition for Writ of Certiorari at 39a. In addition, the Court found that "[i]t is a clearly expressed public policy of the State of Kansas that punitive damages for direct liability cannot be insured against," that "[p]roviding for the award of punitive damages in civil actions is a significant method by which this state protects its citizens," and that the interests of the State of Kansas "would be undermined if Kansas law were not applied to the question presented in this action." *Id*. Thus, the Kansas court held that the insurers were not obligated to pay Playtex for the punitive damage award.

(footnote continued)

[a]s of February 29, 1988, a total of 133 claims involving [toxic shock syndrome] were reported to St. Paul Surplus Lines for the policy term October 1, 1982 - October 1, 1983. These claims are the result of alleged injuries in a number of states including: California; Texas; Oregon; Florida; Oklahoma; South Carolina; North Carolina; Maryland; Iowa; Illinois; Kansas; Ohio; Louisiana; Mississippi; Missouri; Virginia; New York; West Virginia; New Jersey; Utah; Washington; Indiana; and Nebraska.

Trial Court Op. ¶ 37, *reprinted in* Petition for Writ of Certiorari at 36a. Thus, consistent with respondents' position, the fora and laws of the above-named states would determine the availability of payments arising out of punitive awards. In fact, respondents have denied coverage for punitive damages only for injuries in those states where public policy precludes insuring punitive damages. Trial Court Op. ¶ 39, reprinted in Petition of Writ of Certiorari at 36a.

Playtex appealed to the Kansas Supreme Court, arguing, among other things, that the trial court lacked personal jurisdiction and that the trial court improperly applied Kansas law to resolve the dispute. The Kansas Supreme Court affirmed the trial court, expressly finding:

> Playtex purposefully advertised and sold its tampons in Kansas. Playtex initiated the interstate activity giving rise to the insurers' declaratory judgment claim. Playtex profited from its activity in Kansas. Playtex had fair warning that it might be subject to suit in Kansas.

St. Paul Surplus Lines, 777 P.2d at 1266 (Kan. 1989).

Based on its findings, the court concluded that Playtex's contacts with the State of Kansas supported exercise of *in personam* jurisdiction consistent with the dictates of the Due Process Clause of the United States Constitution. *Id.* at 1266. Moreover, in finding the exercise of jurisdiction appropriate, the court noted that "Kansas has a significant policy interest justifying its assertion of personal jurisdiction over Playtex." *Id.* Finally, the court held that application of Kansas law to the dispute was proper because "[w]here an award of punitive damages is made in Kansas, pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages." *Id.*

After obtaining an extension of time in which to file, Playtex petitioned this Court for review of the judgment of the Supreme Court of Kansas.

REASONS FOR DENYING THE PETITION

The Kansas Supreme Court, applying the well-settled jurisdictional principles set forth by this Court, correctly upheld the trial court's exercise of personal jurisdiction over Playtex. In addition, the Kansas Supreme Court correctly applied Kansas public policy to prohibit Playtex from recovering payment for the punitive award entered against it in the State of Kansas. Far from "extreme in its view of state power," the decision of the Kansas Supreme Court merely recognizes Playtex's significant contacts with the State of Kansas in marketing and distributing a product known to cause significant injury, as well as the direct and strong connection between those marketing and distribution activities and this dispute.

I. THE KANSAS COURTS PROPERLY EXERCISED IN PERSONAM JURISDICTION OVER PLAYTEX.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court established a framework for determining the appropriateness of asserting personal jurisdiction. Jurisdiction is appropriate if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *Id.* at 316. In a number of recent cases, this Court has elaborated on *International Shoe* and has set forth clear and workable principles for determining whether the exercise of personal jurisdiction over a non-resident defendant offends the Due Process Clause. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. at 462 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Thus, once the defendant's minimum contacts with the forum have been established, the examination shifts to an evaluation of "other factors" to determine if exercise of jurisdiction comports with "fair play and substantial justice." *Burger King*, 471 U.S. at 476-77. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* In addition, as part of determining the reasonableness of jurisdiction, a court must consider the connection between a defendant's contacts in the forum and the cause of action. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *International Shoe*, 326 U.S. at 319.

More fundamentally, however, in examining the jurisdictional mix of contacts, nexus and fairness, this Court has refused to establish or apply a rigid rule. Rather, this Court has stated: "We . . . reject any talismanic jurisdictional formulas; 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice'." *Burger King* at 485-86 (citing *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978)).

Examination of all the relevant factors in this case reveals that the exercise of personal jurisdiction over Playtex in this action was fully consistent with the principles set forth by this Court and does not warrant review. Playtex's contacts with Kansas are purposeful, continuous and substantial. Moreover, the relationship between Playtex's substantial Kansas contacts and this cause of action is direct and strong. Finally, Kansas' exercise of personal jurisdiction over Playtex promotes fundamental fairness and substantial justice.

1. Playtex's Contacts with Kansas are Purposeful, Continuous and Systematic.

Playtex's purposeful, continuous and systematic contacts with Kansas are sufficient to support the exercise of *in personam* jurisdiction. Examining the nature of those contacts, the Kansas Supreme Court stated:

> Playtex knew that its tampons were distributed in Kansas. There was a product liability risk under the insurance policies arising from the sale of Playtex tampons in Kansas.
>
> . . . .
>
> Playtex purposefully advertised and sold its tampons in Kansas. Playtex initiated the inter-state activity giving rise to the insurer's declaratory judgment claim. Playtex profited from its activity in Kansas. Playtex had fair warning that it might be subject to suit in Kansas. In fact, Playtex has already defended itself in a lawsuit arising from these facts in Kansas.

St. Paul Surplus Lines, 777 P.2d at 1265-66. Thus, it is clear that Playtex conducted substantial activity in Kansas. This activity

strongly supports the Kansas Courts' exercise of personal jurisdiction.[4] *See Helicopteros*, 466 U.S. at 415; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

In stark contrast to the defendants in *Asahi*, and *World-Wide Volkswagen*, Playtex did not merely place its products into the stream of commerce with some vague notion that those products might wind up in Kansas. Rather, Playtex admitted manufacturing products, including Playtex deodorant tampons, which were sold and distributed throughout the United States and particularly in the State of Kansas. *St. Paul Surplus Lines Ins. Co.*, 777 P.2d at 1263. In addition, unlike the manufacturer in *Asahi*, Playtex maintains direct control over its sales and directs shipment of its products into specific states, including Kansas.[5] Thus, unlike the defendants in *World-Wide Volkswagen* and *Asahi*, Playtex has "[p]urposely advertised and sold its tampons in Kansas." 777 P. 2d at 1266. *Cf. Burger King*, 471 U.S. at 473

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[4] The relationship between Playtex's contacts and this dispute (*see* infra at 10-16) and the fairness of jurisdiction in this case (*see* infra at 16-22) supports the exercise of jurisdiction. In addition, Playtex's substantial, systematic, and continuous contacts with the state of Kansas also meet the jurisdictional standard set forth in *Helicopteros* for the exercise of jurisdiction resulting from contacts unrelated to the cause of action. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), cited by the Court in *Helicopteros*, the Court noted the district court's exercise of jurisdiction was supported by its findings that Hustler had engaged in a "general course of conduct in circulating magazines throughout the state"; had "purposefully directed" the magazines at the state; and that Hustler's activities "inevitably affected persons within the state." *Id.* at 774.

[5] In its Answers to Interrogatories, which were a part of the record on appeal, Playtex stated:

> All sales of tampons are communicated to Dover by the field-sales force and those orders are processed by Playtex at Dover. These orders are filled by a shipment of tampons from Dover, Delaware.

Kansas Supreme Court Record XV at 71, *reprinted in* Appendix at 7a.

("forum legitimately may exercise personal jurisdiction over a non-resident who 'purposefully directs' his activities toward forum residents.").[6] In so doing, Playtex has sought to profit from its substantial business activities and contacts with Kansas. Playtex should not now be heard to complain that Kansas has, through the application of Kansas public policy, sought to hold Playtex accountable for its substantial wrongful conduct.

2. This Action Is Directly Related To Playtex's Activities In Kansas.

In addition to the substantial nature of Playtex's contacts with Kansas, Playtex's contacts are directly and strongly related to the present action. The sole purpose of this action is to determine whether Kansas public policy prevents insurability of punitive damages awarded to a Kansas plaintiff for a Kansas death. The connection between the forum contact and the action could not be more clear. Playtex, nevertheless, seizes upon the "nexus" element of this Court's jurisdictional analysis, suggesting that respondents' cause of action was insufficiently related to petitioner's substantial contacts with Kansas.

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[6] In light of its significant contacts with Kansas, Playtex's citations to *Hanson v. Denckla*, 357 U.S. 235 (1958), *Kulko v. Superior Court*, 436 U.S. 84, (1978), and *Rush v. Savchuk*, 444 U.S. 320 (1980) are unavailing. In those cases, this Court found that the respective states could not exercise *in personam* jurisdiction consistent with Due Process because the defendants lacked sufficient minimum contacts with the relevant fora. For example, in *Kulko*, the Court noted that the defendant had only been in the forum state on two occasions, once for three days on his way to service in Korea, and once for 24 hours on his return from the service. *Kulko*, 436 U.S. at 93. This is in stark contrast to Playtex's purposeful and continuous advertising and sales of its products in Kansas. Similarly in *Rush*, the defendant's sole connection with the forum was the presence of his insurer in the state. *Rush*, 444 U.S. at 328-29.

Playtex's contention, however, artificially limits analysis of the nexus between Playtex's Kansas contacts and this dispute by ignoring the purpose of the policies and the reality of the factual basis giving rise to the alleged obligation at issue in this case. Based on its artificially limited view, Playtex asserts an erroneous and simplistic view of this Court's jurisdictional analysis, concluding that a dichotomy exists between a "but for" test and a "substantive relevance" test and that this case represents an example of adoption of the former. Therefore, Playtex seeks review in order that the Court might "clarify" the purported discrepancy between the two incarnations of the nexus requirement.

Playtex's highly artificial and contrived approach, however, ignores this Court's repeated rejections of "any talismanic jurisdictional formulas." *Burger King*, 471 U.S. at 485-86, (citing *Kulko*, 436 U.S. at 92). Rather, as this Court has stated, " 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " *Id.* at 486. Accordingly, in light of the fact-specific nature of the jurisdictional inquiry, adoption of one or the other of the proposed "tests" would not advance the jurisdictional inquiry in any meaningful manner. Instead, adoption of one or the other of the "tests" Playtex advances would lead inevitably to confusion as lower courts would struggle to apply a "talismanic jurisdictional formula" of a type this Court has consistently rejected.

Moreover, even if this Court were inclined to adopt one or the other of the "tests" Playtex advances, this case is an inappropriate vehicle. The result reached by the Kansas Supreme Court is correct under either a "but for" or a "substantive relevance" approach. Therefore, Playtex is inviting the Court to resolve an

issue that the case does not raise. This Court should decline the invitation. *Cf.* Stern, Gressman, Shapiro, *Supreme Court Practice*, §4.4 at 201-2 (6th ed. 1986) (explaining basis for denial of writ in *Sommerville v. United States*, 376 U.S. 909 (1964)).

According to Playtex, the Kansas decision "reflects a deep division" among the lower courts on issues of specific jurisdiction. Petition for Writ of Certiorari at 17. Playtex recognizes, however, that "[s]imply reviewing the lower court decisions" may not reveal the apparent conflict because "the inquiry is quite fact specific, and the courts often recite the particular case's facts without explaining the principle that guides the inquiry." Petition for Writ of Certiorari at 19. Rather than masking a "deep division," this recognition lies at the heart of this Court's jurisdictional analysis. The analysis is fact specific because, in the end, jurisdiction must comport with "fair play and substantial justice." *See Burger King*, 471 U.S. at 485-86.

Although it may be an academically interesting exercise to attempt to categorize the relationship between the cause of action and the forum contacts in any given case, such a categorization is not required under this Court's cases. Furthermore, a failure to engage in such categorization does not mean that a flaw exists in the lower courts' application of jurisdictional doctrine that must be corrected by this Court. *Cf. Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (issue on which certiorari is granted must be "beyond the academic or the episodic"). *Burger King* sets forth clear and workable principles courts must apply, recognizing that, ultimately, the lower courts are charged with doing "substantial justice." Even assuming the existence of the "deep division" Playtex purports to find in the lower courts after imposing its rigid and simplistic approach, such a division does not indicate a conflict that may be corrected merely by

adoption of one "test" or another. Rather, the differing results Playtex decries arise because the lower courts are simply applying the clear principles which this Court has established to the specific facts of each individual case.[7]

Moreover, even if the present case is analyzed under the framework petitioner suggests, the decision of the Kansas Supreme Court must be upheld. According to Playtex, the substantive relevance test provides that: "A contact counts for specific jurisdiction purposes only if the conduct of the defendant that gives rise to the contact is relevant in adjudicating the

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[7] Playtex cites three cases as examples of instances in which the courts applied a lenient "but for" test to determine whether a defendant's contacts were sufficiently related to the cause of action. Nevertheless, the cases fit into the broader jurisdictional analysis established by this Court. For example, in *Gates Learjet Corp. v. Jensen*, 743 F.2d 1235 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985), the Ninth Circuit upheld jurisdiction by applying the following analysis:

(1) The nonresident defendant must consummate some transaction or perform some act by which he purposely avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.

(2) The claim must be one which arises out of or results from the defendant's forum-related activities.

(3) Exercise of jurisdiction must be reasonable.

743 F.2d at 1331.

After finding the necessary contacts under the first element, the Ninth Circuit determined the causes of action at issue arose out of those contacts. *Id.* at 1332. Most importantly, the *Gates* court devoted the bulk of its analysis to the third element. Through this reasonableness inquiry, the *Gates* court gave voice to this Court's requirements of fairness and substantial justice. *Id.* at 1332. Only after reviewing the reasonableness of jurisdiction did the *Gates* court determine that exercise of jurisdiction was proper.

Gates is absolutely faithful to this Court's guidance. While relatedness is one factor which must be examined, jurisdiction is determined based upon a collection of factors which ultimately require the court to determine what is reasonable. *Gates* did not, as Playtex suggests, adopt a particular nexus test.

merits of the particular dispute." Petition for Writ of Certiorari at 18. In her article, upon which Playtex relies as setting forth the "substantive relevance" test, Professor Brilmayer states the test another way: "To state that there is a related contact is to state that one of the occurrences relevant to the issues in litigation occurred in the forum." Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 88 (1980) (hereinafter Brilmayer).

Without directly analyzing the Kansas Court's decision in light of the substantive relevance standard, Playtex simply asserts that the relationship between its Kansas contacts and this cause of action does not rise to the level of substantive relevance. Playtex reaches this conclusion elliptically by asserting that the Kansas Supreme Court applied a "but for" test.[8] Yet even assuming that the Kansas Supreme Court implicitly applied a "but for" test, it does not, therefore, follow that Playtex's Kansas contacts would not also pass a "substantive relevance test" to the extent such test differs from a "but for" test.

Applying the "substantive relevance test," Playtex's Kansas contacts are clearly "relevant in adjudicating the merits of [this] dispute." The alleged obligation in dispute owes its very existence to a tort action arising out of the sale of Playtex's product in Kansas which caused the death of a Kansas resident. Applying Kansas law, a Kansas jury awarded punitive damages to Betty O'Gilvie's survivors. The substantive question at issue

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[8] According to petitioner, support for this assertion is found in the Kansas Supreme Court's statement that "if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurers." Petition for Writ of Certiorari at 20.

here is whether petitioner can obtain insurance reimbursement for that punitive damage award. Thus, it is clear that "occurrences relevant to the issues in litigation occurred in the forum." *Id.*

Further evidence of the substantive relevance of Playtex's contacts with Kansas may be found in the important role those contacts played in forming the substantive (as opposed to the jurisdictional) basis of the respondents' cause of action.[9] Even assuming respondents could have brought this action in a forum other than Kansas, the critical link between Playtex's contacts with Kansas (which included the marketing and sales of products causing the underlying injury, the tort action, and the punitive award) and the respondents' action would have required Playtex's Kansas contacts to be pled as part of the Complaint. In light of this fact, the substantive relevance of Playtex's Kansas contacts with the forum is indisputable.[10]

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[9] Playtex devotes several pages to arguing that Kansas law should not be applied to this dispute. Petition for Writ of Certiorari at 23-27. In so doing, however, Playtex at least tacitly recognizes that the Kansas contacts are relevant to, if not dispositive of, this dispute. Choice of law is clearly relevant to this action. Therefore, Playtex's Kansas contacts are relevant in a substantive, if not dispositive manner. In this light, to suggest that the connection between Playtex's Kansas contacts and this dispute is "too attenuated" to be relevant is to ignore the important and potentially outcome-determinative role those contacts play in the dispute.

[10] In her article, Professor Brilmayer notes the value of examining a "comparable domestic complaint" in determining whether the defendant's contacts carry substantive, as opposed to merely procedural, significance. The article states:

(footnote continues)

In sum, Playtex attempts to present this Court with a highly artificial and contrived choice between two talismanic jurisdictional formulas. These formulas, while of potential academic interest, are contrary to this Court's repeated admonition to the lower courts to weigh the facts of each case to determine "whether personal jurisdiction would comport with 'fair play and substantial justice.'" In any event, this case does not present the choice of formulas Playtex proposes. Kansas jurisdiction is proper under the most stringent of the standards Playtex proposes.

3. The Kansas Court's Exercise of *In Personam* Jurisdiction Over Playtex is Consistent with Traditional Notions of Fair Play and Substantial Justice.

The Due Process limitation on the exercise of *in personam* jurisdiction serves two "related, but distinguishable, functions." *World-Wide Volkswagen*, 444 U.S. at 292. First, "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* Second, it "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *Id.* In the instant case, the Kansas Court's assertion of *in personam* jurisdiction was fully consistent with both functions.

With respect to the first function, this Court has inquired whether the defendant's contacts with the forum are "such that

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(footnote continued)

> A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact.
>
> Brilmayer at 82 (footnotes omitted).

maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.' " *Id.* at 292 (quoting *International Shoe*, 326 U.S. at 316 (1945)). Applying the standard, "a forum legitimately may exercise personal jurisdiction over a non-resident who 'purposefully directs' his activities toward forum residents." *Burger King Corp.*, 471 U.S. at 473. As this Court has recognized, requiring purposeful contacts ensures that the defendant will not be haled into court on the basis of "random," "fortuitous," or "attenuated" contacts. *Id.* at 475. Moreover, such deliberate activity in the forum indicates that the defendant "manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."[11] *Id.* at 476.

Here, there can be no doubt that Playtex purposefully directed its activities at Kansas residents. As the Kansas Supreme Court stated, "Playtex purposefully advertised and sold its tampons in Kansas." In addition, Playtex does not here nor did it ever challenge the jurisdiction of the Kansas Courts over the underlying tort claim which resulted in the judgment

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[11] In its Petition, Playtex contends that the underlying tort action does not evidence its contacts with Kansas because the presence of the litigation was the result of the unilateral decision of the plaintiff to commence the action in Kansas. Petition for Writ of Certiorari at 13 n.5. This contention is erroneous in a number of respects. First, the very fact that the plaintiff obtained jurisdiction over Playtex in Kansas and that Playtex did not object to such jurisdiction evidences Playtex's substantial contacts with the State of Kansas. Second, although the decision to commence the action may have been unilateral, the genesis of the action was that Playtex acted consciously and purposefully in advertising and selling defective products in Kansas. Finally, the entry of the judgment giving rise to Playtex's claim of coverage occurred in Kansas.

which forms the basis of this dispute. To the contrary, Playtex stipulated in the tort action to the Kansas court's *in personam* jurisdiction over it. Moreover, despite Playtex's attempt to minimize the nexus between the insurance policy at issue and the forum, it is indisputable that the alleged obligation on which Playtex seeks to recover is based on the punitive damage award entered in the State of Kansas as a result of Playtex's culpable conduct in marketing and selling its products in Kansas.

In addition, the existence of an insurance contract covering risks in Kansas is relevant to the fairness analysis on another level. The simple fact that Playtex chose to insure risks in Kansas indicates that Playtex expected to defend suits in Kansas. Indeed, this Court has identified procurement of insurance as one of the steps a corporation might take if its contacts are such as to provide it with "clear notice that it is subject to suit" in the forum.[12] *Asahi*, 480 U.S. at 110 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

Playtex has structured its conduct so as to be certain that its products in Kansas would be covered by insurance. The insurance contracts at issue were not, as Playtex contends, pure indemnification agreements. Under the contracts, the insurers were obligated to pay directly "ultimate net loss" covered under the policies. That "ultimate net loss" could be payable in any

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[12] Playtex contends that no jurisdictional significance should be given to the facts that the relevant insurance contracts covered risks in Kansas and contained endorsements required by Kansas law in light of the nationwide coverage provided in the contract and endorsements relating to virtually every other state. Petition for Writ of Certiorari at 14 n.6. Yet, the policy coverage and endorsements clearly evidence Playtex's intent to insure against liabilities arising out of its deliberate contacts with Kansas. That Playtex believed it might incur liabilities as a result of its activities in other states does not operate to deprive Kansas of jurisdiction over this matter.

state where a covered claim arose. In this case, "ultimate net loss" was incurred, payable and paid in Kansas. [13] Thus, Playtex clearly enjoys the benefits of the laws of Kansas, including laws relating to insurance. Accordingly, it was eminently reasonable and foreseeable that a dispute involving the application of an insurance contract relating to Playtex's Kansas products would be located in Kansas. In this light, Playtex's assertion that it "could not have reasonably expected that it could be haled before a Kansas court in a suit seeking an interpretation of the contracts," Petition for Writ of Certiorari at 15, is simply disingenuous.[14]

The well-reasoned decision of the Kansas Supreme Court also does not inject unpredictability where none before existed. Rather, it recognized Playtex's purposeful, substantial and continuous contacts with Kansas and found that those contacts gave rise to the punitive award which is the very subject matter of this litigation. If, as Playtex argues, it may be amenable to suit in every jurisdiction in which its products may be found, it

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[13] Ultimate net loss is defined as "[t]he total sum which the insured *or any company as his insurer* . . . or both pays as a consequence of an "occurrence" . . . Kansas Supreme Court Record at Vol. II p.179 (emphasis added).

[14] In *Rush*, 444 U.S. 320 (1980), the Court stated that, unless "related to the operative facts" of the action, the contractual arrangements between the defendant and its insurer are not relevant to the substance of the underlying litigation and accordingly do not affect the court's jurisdiction "*unless they demonstrate ties between the defendant and the forum.*" *Id.* at 329 (emphasis added). Thus, petitioner's citation of *Rush* is erroneous in at least two respects. First, unlike *Rush*, the operative facts of the underlying action in this case are not only related, but also serve as the basis for this action. Second, Playtex purchased the policy at issue for the purpose of covering liabilities arising out of its contacts with Kansas. Accordingly, the policy, in addition to being directly connected to the underlying action, demonstrates Playtex's purposeful ties with the State of Kansas.

is only because Playtex has purposefully and continuously directed its products to those states and because the question of whether it will be liable for the harm its products cause forms the basis of the suits. *Cf. Asahi*, 480 U.S. at 109-112 (O'Connor, J., joined by Rehnquist, C.J., Powell, J.J., and Scalia, J.J.); *World-Wide Volkswagen*, 444 U.S. at 297-98. Because Playtex's marketing and sales of its products in Kansas form the basis of this action, there is no unfairness in allowing the State of Kansas to assume jurisdiction.

Finally, the Kansas decision is fully consistent with the Due Process protection against states reaching out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system. As the Kansas Supreme Court noted in its decision, "[w]here an award of punitive damages is made in Kansas, pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages." *St. Paul Surplus Lines*, 777 P.2d at 1266. This litigation is not, as Playtex contends, a dispute primarily about indemnification. The State of Kansas is not, as was the State of California in *Asahi*, a bystander to a dispute between private litigants over indemnity. The State of Kansas has a greater interest in this litigation than providing for its citizen's collection of a judgment. The State of Kansas has a direct interest in this case in

requiring Playtex, as the culpable party, to pay any punitive damage award.[15]

More importantly, the facts that Playtex's product caused a death in Kansas, that a Kansas Court entered a judgment awarding punitive damages to a Kansas citizen, and that the Kansas award is the basis of this action, all serve to implicate the interest of Kansas and to focus the dispute on Kansas. In this light, Playtex's contention that its contacts with the State of Delaware and Delaware's alleged "closer connection" to the dispute by reason of the fact that Playtex was to receive its indemnity payment in Delaware must fail.[16] Not only is the contention factually inaccurate, *see* supra at 18-19, but the Due Process

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[15] There is no merit to petitioner's contention that the interest of the State of Kansas is remote because "[t]he amount of the punitive damages award, the stigma associated with such an award, and the fact that the award is likely to be reflected in increased insurance costs or the inability to obtain insurance at all, guarantees a significant deterrent effect." Petition for Writ of Certiorari at 16. It is not for petitioners to determine whether mere entry of the award, without its enforcement against the culpable party, will provide a sufficient deterrent to it and to other culpable parties. Rather, that judgment, laden as it is with public policy, is for the State of Kansas to make.

[16] Interestingly, Playtex's allegation of forum shopping might be most appropriately leveled at itself. Rather than accepting the law of the state in which its products cause injury for purposes of determining whether a punitive award may be indemnified (a fact that is puzzling in light of Playtex's assertion that the majority rule allows indemnification), Playtex contends that the law of Delaware should apply. Not surprisingly, the law of Delaware allows a culpable party to receive indemnity for its reckless and wanton acts. See *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986). Indeed, if there was any forum shopping, it was clearly evidenced by Playtex's claim in the trial court that Delaware was its principal place of business notwithstanding the fact that in other litigation it had claimed as its principal place of business Connecticut, where its corporate headquarters are located. Trial Court Op. ¶ 16, *reprinted in* Petition for Writ of Certiorari at 33a.

Clause does not limit jurisdiction only to the state with the most or strongest contacts. Accordingly, the strong public policy interest of Kansas in the instant dispute weighs in favor of finding that Kansas properly exercised *in personam* jurisdiction.

In sum, Playtex's substantial contacts with the State of Kansas and the nature of those contacts indicate that Playtex was not unduly prejudiced by litigating its claim in the Kansas Courts. Rather, Playtex's conduct in purposefully directing its activities at Kansas and the benefit it derived from the general laws of Kansas as well as the laws relating to insurance establish the eminent fairness of requiring Playtex to appear and defend in Kansas. In addition, the special interest of Kansas in this dispute and the public policy it seeks to promote also allow it to exercise jurisdiction consistent with Due Process limitations.

II. THE KANSAS COURT'S DECISION TO APPLY KANSAS LAW IS FULLY CONSISTENT WITH THIS COURT'S GUIDANCE.

Playtex understandably wishes to disregard the effects its products had on the residents of Kansas. The fact remains, however, that one of the products Playtex marketed and sold in Kansas caused the death of a Kansas resident. As a result, a Kansas jury applying Kansas law awarded substantial punitive damages against Playtex. Given the award, the State of Kansas has an overwhelming interest in enforcing its public policy by ensuring that the culpable party actually pays the punitive award. Therefore, the decision of the Kansas Court applying Kansas law is proper and entirely consistent with this Court's Due Process requirements.

Playtex erroneously relies on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in support of its contention that application of Kansas law violates Due Process protections. In *Shutts*, the Court determined that Kansas law would not properly apply to resolve petroleum lease royalty disputes with respect to out-of-state leaseholders and out-of-state leases. Although Playtex correctly notes that the present case is distinguishable from *Shutts*, Petition for Writ of Certiorari at 26, it errs in arguing that the standards set forth in *Shutts* are inconsistent with the decision of the Kansas Supreme Court. Rather, application of Kansas law is fully consistent with *Shutts* and with this Court's decisions outlining Due Process limitations on choice-of-law decisions.

This Court began its analysis in *Shutts* by determining whether the law applied "conflicts in any material way with any other law which could apply." 472 U.S. at 816. After finding a conflict, this Court next determined whether the state whose substantive law had been applied had a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 472 U.S. at 818, (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

Concerning the threshold inquiry, the assertion that Delaware allows a culpable party to be indemnified for punitive damages awarded against it, Petition for Writ of Certiorari at 24, is insufficient to demonstrate a conflict between Kansas law and any other law which could apply. Modern choice-of-law analysis requires the application of the law of that state which has the most significant interest in the outcome of the dispute. *See e.g.*, *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 (1969). The record is clear that relevant policies were negotiated in

Illinois, California and New York. Trial Court Op. ¶¶ 26-30, reprinted in Petition for Writ of Certiorari at 34a-35a. They were issued in Minnesota, California, New York and Illinois. *Id.* All policies were delivered to Esmark in Illinois. *Id.*

Thus, although Kansas, as the jurisdiction in which the death occurred and the resulting punitive award was entered, has the most significant interest and contacts with this dispute, Illinois, Minnesota, California and New York are other states which also conceivably have some relation or contacts to this dispute. Yet, the law of Illinois, Minnesota, California and New York, like the law of Kansas, precludes the insurance of punitive damages. *Ford Motor Co. v. Home Ins. Co.*, 172 Cal. Rptr. 59, 116 Cal. App. 3d 374 (Cal. App. 1981); *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 51 Ill. Dec. 500, 420 N.E.2d 1058 (Ill. App. 1981); *Public Services Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810 (1981); and *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327 (1973). Thus, Playtex simply cannot make the requisite threshold showing that Kansas law conflicts with any other law which could apply.

In response, Playtex asserts that Delaware law, which apparently allows insurance of culpable conduct, applies to all disputes concerning punitive awards entered against it nationwide. Yet Playtex has never clearly demonstrated that Delaware law could be applied to this dispute. Playtex argued that because it was incorporated in Delaware, the location of the insured risk under the policies was Delaware. In addition, Playtex asserts, without substantiation, that Delaware is the place where payment under the policies was to occur. Petition for Writ of Certiorari at 24. In fact, the evidence in the record is clear that the insurers' payment of the compensatory award under the policies occurred in Kansas and that payment of the punitive award,

had it been due, would also have occurred, pursuant to the terms of the contract, in Kansas as well. *See, supra* at 18-19; *see also* Affidavit of Kristi E. Teigen, Kansas Supreme Court Record Vol. XX at p. 23, *reprinted in*, appendix to this brief at 1a-3a. Although Playtex's strategic plan has been to argue nationwide for the application of Delaware law to all punitive damages disputes, the record in this case demonstrates that Delaware has insufficient contacts and interest in the dispute to even be considered as a state whose law could apply. Accordingly, because all of the states whose laws could apply are uniform in prohibiting a culpable party from receiving payment for punitive damages, the Court need not even explore beyond the threshold conflict inquiry.

Assuming, however, the Court were to move beyond the threshold inquiry, Playtex's "significant contacts" with Kansas creating its substantial interest in enforcing the punitive award entered in Kansas arising out of culpable conduct which occurred in Kansas are such that "choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818. This Court's cases require that the state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted" in the litigation. *Id.* at 821. That is, the state must have a connection to the "particular set of facts giving rise to [the] litigation." *Id.* at 818. Disregarding this clear language, Playtex artificially limits its consideration to the insurance policies themselves rather than considering the totality of the actions giving rise to this dispute. Based on that erroneous and artificially limited view, Playtex contends that application of Kansas law is improper "in the absence of a direct contact

between the forum and the transaction at issue (*here, the insurance policies*)." Petition for Writ of Certiorari at 26 (emphasis added).

Yet, applying the appropriate standard and examining the totality of the particular facts giving rise to this litigation, Kansas has a compelling justification for applying its law to resolve the dispute in question. A product that Playtex deliberately marketed and sold in Kansas caused the death of a Kansas resident, Betty O'Gilvie. Betty O'Gilvie's survivors, who were residents of Kansas, sued Playtex in Kansas and obtained a punitive damage award. It is that punitive damage award and the facts on which it is based that "give rise to this litigation." *Shutts*, 472 U.S. at 818. Thus, Kansas has a clear connection to the facts giving rise to this litigation.

Contending that Delaware law, rather than Kansas law, should apply, Playtex asserts that "it is highly relevant that in all of the cases in which the forum's decision to apply its law was upheld, the policy beneficiary was a resident of the forum *or at least was injured there*." Petition for Writ of Certiorari at 25 (emphasis added). Respondents agree that the location of the injury is relevant, yet given the nature of the policy and the insured risk, the loss insured against clearly occurred in Kansas. The policies here at issue are multiple risk policies covering every state. Interpreting such policies, courts treat the policies as if they contained a separate policy covering each state and have consistently applied the law of the forum where the injury occurred in interpreting them. *See Raymond v. Monsanto Co.*, 329 F. Supp. 247, 249 (D. N.H. 1971) (determining an insurer's right to withdraw representation based upon law of forum where injury occurred). *See also, Norfolk & Western Ry. Co. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92, 94 (N.D. Ind.

1976) ("[T]o an extent, the policy incorporates the law of every state in which the insured's activities may take place.").[17] Thus, the relevant loss (entry of the punitive award) occurred in Kansas.[18]

In addition, Kansas has a substantial public policy interest in this dispute. The law of Kansas precludes the insurability of punitive damages. *Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co.*, 228 Kan. 532, 618 P.2d 1195 (1980); *Smith v. Merchants Mut. Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973). The clear public policy underlying the law is that the

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[17] *See also*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §193 Comment f (1969). The comment specifically addresses the "location of the risk" issue with respect to multi-risk insurance policies:

> Multiple risk policies. A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved three policies, each insuring an individual risk.

[18] With respect to Playtex's residence, the Court should note that of the cases Playtex cites only *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), involved a multi-state, multi-risk comprehensive general liability policy such as the policies in the present case. *Watson* involved a suit by the injured party against the insurer under Louisiana's direct action statute. The Court should note that the *Watson* Court upheld the application of the law of the place where the injury arose even though the injured person was a third party and not party to the original insurance contract. The insurance contract at issue was negotiated in Massachusetts and delivered in Illinois and Massachusetts and had a clause expressly prohibiting direct action prior to a final determination of the underlying liability. *Id.* at 67-68. Nevertheless, because the underlying third party injury occurred in Louisiana, Louisiana law was applied based on the state's "legitimate interest in safeguarding the rights of persons injured there." *Id.* at 73.

deterrent effect of a punitive award is blunted and wrongful behavior is encouraged by allowing the culpable party to contract for payment of a punitive award by a guiltless guarantor. Yet, if Kansas is precluded from applying its public policy to this dispute, non-resident Kansas tortfeasors will be able to circumvent this policy merely by contracting with an out-of-state insurer.

Given the substantial connection between the facts giving rise to this action and the State of Kansas, application of Kansas public policy through its law is fully justified and consistent with Due Process requirements. This Court long ago indicated that a state may permissibly apply its public policy to resolve a dispute. In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), this Court stated:

> Doubtless, a state may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights . . . It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.

281 U.S. at 410. Applying the standard set forth in *Dick*, Kansas may pursue its public policy unless the rights it is seeking to enforce have "no relation to anything done or to be done within" Kansas. Given the direct connection between the facts giving rise to this litigation and the State of Kansas, there can be no doubt that Kansas properly applied its public policy in this action.

Finally, Due Process protections require that a state's "choice of law is neither arbitrary nor fundamentally unfair." *Shutts*,

472 U.S. at 818, 819. In *Shutts*, this Court further stated that "[w]hen considering fairness in this context, an important element is the expectation of the parties." 472 U.S. at 822. Concerning its expectations, Playtex disingenuously asserts that it "had absolutely no reason to anticipate that Kansas law would apply in the event of a coverage dispute." Petitioner's brief at 26. The record, however, clearly indicates that Playtex expected Kansas law would apply in the event of a Kansas punitive damages award. Evidence of Playtex's expectation is found in their Form S-1 Registration Statement filed with the SEC. Kansas Supreme Court Record Vol. III at p. 19. In that form, Playtex, in discussing its insurance coverage, stated that "certain state laws place limitations on coverage for punitive damages." *Id.* The statement clearly evidences Playtex's understanding that insurability of punitive awards would be determined according to the law of the state in which the award was entered.

In addition, Charles Kahsen, Playtex's agent who drafted the policy language relevant to punitive damages coverage, has testified to his understanding and intent that the question of insurability of punitive damages would be governed by the choice-of-law principles of the state where any given action was pending. Kansas Supreme Court Record, Vol. XI, pp. 38-39, reprinted in Appendix to this Brief at 4a-5a. Thus, it is clear that Playtex recognized coverage for punitive damages would be determined on a state-by-state basis.

In sum, the decision of the Kansas Supreme Court concerning the choice of law decision is fully consistent with the clear framework set forth by this Court to determine whether a state's choice of law comports with Due Process guarantees. The State of Kansas has a direct connection with the totality of the

facts giving rise to this action. Moreover, Kansas has a clear and substantial public policy interest in this dispute, and Playtex expected that policy would be given effect should it seek payment for a punitive award entered in Kansas. Therefore, the decision of the Kansas Supreme Court is correct and does not warrant this Court's review.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE

Eighteenth Judicial District

DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

ST. PAUL SURPLUS LINES INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY and AIU INSURANCE COMPANY, *Plaintiffs,* vs.— INTERNATIONAL PLAYTEX, INC. and PLAYTEX FAMILY PRODUCTS, INC., *Defendants.*	File No. 88-C-463

AFFIDAVIT OF KRISTI E. TEIGEN

STATE OF MINNESOTA }
COUNTY OF RAMSEY } ss.

KRISTI E. TEIGEN, being duly sworn, deposes and states as follows:

1. I am a Claims Manager employed by St. Paul Surplus Lines, one of the parties in this action. I am responsible for handling and monitoring the claims asserted against International Playtex, Inc. (IPI) arising out of Toxic Shock syndrome (TSS).

2. I have attended claims meetings with representatives of Crawford & Company, the independent claims adjusting service retained by IPI to handle claims for TSS. These meetings are attended by representatives of other insurers and representatives of IPI. Joel Coleman, General Counsel for IPI, attends these meetings, as a representative of IPI.

3. Joel Coleman, to my knowledge, the only employee of IPI who has communicated with the insurers regarding claims of TSS, including matters involving punitive damages. In the Fall of 1987 it was Mr. Coleman who informed St. Paul Surplus Lines and National Union that IPI would look to St. Paul Surplus Lines and National Union to pay the $10,000,000 punitive damage award, interest, and cost of appeal of the *O'Gilvie* action.

4. The underlying excess umbrella carrier, Mission National Insurance Company, denied coverage for the punitive damage award in the *O'Gilvie* action. It is my understanding that Mr. Coleman as a representative of IPI, communicated with representatives of Mission regarding the reasons for the denial. It is also my understanding that Mr. Coleman has had communications with other carriers relating to the insurability of another punitive award in a prior action against IPI.

5. Mr. Coleman signed a "letter of intent" that was to be executed by IPI's liability carrier, relating to the handling of TSS claims. A true and correct copy of this letter is attached to this Affidavit.

6. It is my understanding that Mr. Coleman is the liaison between IPI and the insurers regarding coverage issues relating to TSS.

7. If St. Paul Surplus Lines is found liable for the payment of the punitive damage award in the *O'Gilvie* action it would make a direct payment of this amount, plus accrued interest, to the attorney who represented the estate of Ms. *O'Gilvie* in that action. That payment would be made in Wichita, Kansas.

8. Attached to this Affidavit are true and correct copies of checks that have been paid directly by St. Paul Surplus Lines to counsel in the Toxic Shock Syndrome claim asserted against International Playtex, Inc.

FURTHER AFFIANT SAYETH NOT.

/s/

KRISTI E. TEIGEN

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

ST. PAUL SURPLUS LINES INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY and AIU INSURANCE COMPANY, *Plaintiffs,* -against- INTERNATIONAL PLAYTEX, INC. and PLAYTEX FAMILY PRODUCTS, INC., *Defendants.*	File No. 88-C-463

Deposition of CHARLES W. KAHSEN, held at the offices of Spengler, Carlson, Gubar, Brodsky & Frischling, Esqs., 280 Park Avenue, New York, New York, on the 12th day of May, 1988, at 3:05 o'clock p.m., pursuant to Notice, before Andrew L. Pustay, a Notary Public of the State of New York.

APPEARANCES:

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BY: BETHANY K. CULP, ESQ.

-and-

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BY: PHILIP J. WALSH, ESQ.,

Of Counsel

. . . .

Q. Mr. Kahsen, what was your intent when you included that language "to the maximum extent permitted by law"?

A. That if and when a contract action was brought with respect to the insurability of a punitive award, that the state where the action was brought would apply its law, including its conflicts law, in making a determination.

Plaintiff's Response to Defendant's First Set of Interrogatories, in *Playtex Family Products Co. v. St. Paul Surplus Lines Ins. Co.*, Superior Court for the State of Delaware, New Castle County, C.A. No. 88-FE-166-1-CV.

INTERROGATORY NO. 1: Identify the locations where Playtex Super Deodorant Tampons were manufactured during the years 1980-83.

RESPONSE: Since 1968, Playtex has maintained a manufacturing and distribution center for tampons in Dover, Delaware; Playtex' predecessor began doing business in Delaware in 1932. During the years 1980-83, the Delaware facility produced approximately 85% of all Playtex tampons distributed nationally.

During the years 1980-83, Playtex' Dover, Delaware facility was the operational headquarters for the manufacturing, packaging, quality control, and product distribution processes. Personnel located at the Camarillo, California facility reported directly to personnel in Dover, Delaware.

During the 1980-83 period, Playtex maintained a manufacturing and distribution facility in Camarillo, California for the production and distribution of Playtex tampons in certain Western states. In June, 1983, the tampon manufacturing operation at this facility was discontinued. During the years in question, the California facility distributed approximately 15% of the overall volume of Playtex tampons sold domestically, specifically in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas (El Paso County only), Utah, Washington, Wyoming, Alaska and Hawaii.

Plaintiff's complex in Dover, Delaware consists of more than 81 acres. Playtex also leases 184,680 square feet of office space. The Playtex complex at Dover is the manufacturing, packaging and distributing hub of the company for all of its domestic products, including tampons. The Dover facilities of Playtex serve as the operational headquarters for Playtex' administrative groups and is the location for corporate-wide Treasury, Finance, Tax, Management Information Services and Risk and Insurance functions. All sales of tampons are communicated to Dover by the field-sales force and those orders are processed by Playtex at Dover. These orders are filled by a shipment of tampons from Dover, Delaware. The Camarillo, California facility now serves solely as a distribution facility and all shipments from that California facility are made in response to orders which are received and processed at Dover. Since tampons are regulated by the Federal Food and Drug Administration ("FDA"), inspectors from the FDA inspect Playtex' tampon facilities at Dover. The accounts payable and accounts receivable functions are handled exclusively at Dover, as are the billing and posting of invoices and the posting of receipts of cash for all domestic products.

No. 89-749

In the Supreme Court of the United States

OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION, PETITIONER

v.

ST. PAUL SURPLUS LINES INSURANCE CO., ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

In the Supreme Court of the United States

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REPLY BRIEF FOR THE PETITIONER

I. THE KANSAS SUPREME COURT'S PERSONAL JURISDICTION RULING SHOULD BE REVIEWED BY THIS COURT

A. The Question Presented Is Important.

Virtually all of respondents' arguments attempt to establish that the Kansas Supreme Court's personal jurisdiction holding is correct. As we discuss below (at pages 5-7), those efforts are unavailing. Most significant for purposes of this Court's decision whether to grant review, however, is that respondents do not seriously challenge our contention that the Kansas Supreme Court decided an important question of federal law that warrants consideration by this Court. Thus, respondents

do not dispute that the lower federal and state courts have adopted conflicting approaches in determining the permissible scope of specific jurisdiction (see Pet. 17-20) and that the issue is one of great practical importance (see Pet. 20-21), nor do respondents deny that the broad jurisdictional rule adopted by the Kansas Supreme Court will lead to a tremendous expansion in the scope of specific personal jurisdiction by state courts. See Pet. 12-14; see also Amicus Curiae Brief of Product Liability Advisory Council, Inc. Instead, respondents advance three flawed reasons why this Court should nonetheless deny review.

First, respondents assert (Br. in Opp. 11-13) that this Court already has provided substantial guidance with respect to the due process limits on personal jurisdiction and that further review "would not advance the jurisdictional inquiry in any meaningful manner" (Br. in Opp. 11). Any divergence in approach among the lower courts is, they suggest, an unavoidable result of the fact-bound nature of the jurisdictional inquiry. But this Court in *Helicopteros* specifically identified—and reserved decision of—the unsettled legal issue that is dispositive in this case: what standard a court should apply in deciding whether a particular claim arises out of or relates to a defendant's purposeful contacts with the forum. See 466 U.S. at 415 & n.10. And courts and commentators have observed that the lower courts now apply different standards in making this determination. See Pet. 19-20. In the face of these authorities, which respondents do not challenge, respondents' assertion that this case would not enable the Court to provide guidance to the lower courts with respect to an unsettled question of law is quite bewildering.[1]

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[1] Respondents suggest (Br. in Opp. 7) that assessing the connection between the defendant's forum contacts and the cause of action is simply "part of determining the reasonableness of jurisdiction." Respondents have misread this Court's decisions, which require that a plaintiff seeking to establish specific personal jurisdiction over a nonresident defendant show that (1) the defendant initiated sufficient purposeful contacts with the forum; (2) the claim arises

Second, respondents suggest (Br. in Opp. 11-12) that in seeking an answer to the question left open in *Helicopteros* we are urging the Court to adopt a " 'talismanic jurisdictional formula.' " That is nonsense. This Court need not and should not lay down a fixed formula; it should simply provide the lower courts with guidance as to the nature of the connection between forum contacts and cause of action that due process requires. Just as this Court's recent pronouncements on the "purposeful availment" standard guide the lower courts in determining which of the contacts between a defendant and the forum are relevant for personal jurisdiction purposes, the Court's determination in this case regarding the necessary connection between a defendant's forum contact and the plaintiff's cause of action will assist the lower courts in determining whether due process allows the exercise of specific jurisdiction in a particular case. As the Sixth Circuit recently observed, "[m]ore sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it—and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court." *LAK, Inc.* v. *Deer Creek Enterprises*, 885 F.2d 1293, 1304 n.7 (6th Cir. 1989).

Finally, respondents contend (Br. in Opp. 11-15) that the present case is an inappropriate vehicle for addressing this "nexus" question, because the connection between Playtex's contacts with Kansas and respondents' suit on the insurance contracts is sufficiently close to

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out of or is related to those contacts; and (3) the assertion of jurisdiction over the defendant is fair. See *Helicopteros*, 466 U.S. at 415 & n.10; see also *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). As respondents themselves indicate (Br. in Opp. 13 n.7), the lower courts have followed this three-step approach. Determining whether the claim is sufficiently related to the contacts is thus an independent inquiry.

satisfy any possible standard. To begin with, respondents do not deny that the Kansas Supreme Court applied a "but for" test—the loosest possible "nexus" standard. Respondents' self-serving assertions about the result that the lower court might have reached had it applied a more stringent test are therefore beside the point. Playtex is entitled to a *judicial* application of the correct legal standard to the facts of this case.

In any event, respondents are plainly wrong in asserting that specific jurisdiction over Playtex would be upheld under the "substantive relevance" test. See Pet. 20. They reach this conclusion by arguing that the tort action in federal district court in Kansas and the resulting judgment constitute relevant contacts between Playtex and Kansas. But, as we discuss below, those contacts (which were *not* the basis for the Kansas Supreme Court's decision) were not initiated by Playtex and therefore cannot be considered in the jurisdictional analysis. Because the only contact relied on by the court below—the marketing of Playtex's products—is legally *irrelevant* to respondents' contract claim, the result in this case would have been different had the Kansas court applied the more restrictive "substantive relevance" standard applied by other courts.

Respondents' analysis also proceeds from the wholly mistaken premise that the only alternative to the "but for" test is the "substantive relevance" test. This Court might well decide to fashion its own standard drawn from its personal jurisdiction decisions. As we discussed in the petition (at 10-17), the sole purposeful contact between Playtex and Kansas—the marketing of Playtex products in that State—would not satisfy such a standard, because the connection between that contact and the insurance dispute is far too remote.

In sum, respondents have not presented a single plausible reason why the issue presented in the certiorari petition should not be reviewed by this Court.

B. The Kansas Supreme Court's Decision Is Erroneous.

We showed in the certiorari petition (at 10-17) that the Kansas Supreme Court erred in concluding that respondents' contract claim arises out of or is related to the sale of Playtex products in that State. Although respondents purport to meet our argument by defending the reasoning of the Kansas Supreme Court, their response actually serves to illuminate the defects in the lower court's reasoning.

As a threshold matter, respondents confirm that the Kansas Supreme Court's extremely loose "nexus" standard effectively eliminates any distinction between specific and general jurisdiction: they agree with our conclusion (Pet. 12-13, 15) that under the Kansas court's approach a product manufacturer may be subjected to *general* jurisdiction in any state in which its products are distributed. See Br. in Opp. 9 n.4, 19-20. That highly unlikely result by itself shows that the lower court's analysis cannot be squared with this Court's precedents.

Even more revealing is respondents' own analysis of the nexus issue. Each time that respondents try to demonstrate the close connection between Playtex's Kansas contacts and the present lawsuit, they emphasize the relationship between this contract action and *the Kansas tort suit and judgment*. See, *e.g.*, Br. in Opp. 10, 14-15, 17 n.11, 21. The Kansas Supreme Court, however, did *not* base jurisdiction over this contract dispute on the presence of the tort litigation in Kansas. Instead, the court below relied on the distribution of Playtex products in Kansas (see Pet. App. 11a), a factor that respondents relegate to secondary status, when they mention it at all. The reason that respondents are reluctant to defend the Kansas court's rationale is not difficult to discern: the connection between the contract action and the product sales is quite attenuated, while the link between the tort suit and the contract actions at

least appears much closer. Respondents have been forced to rewrite the Kansas Supreme Court's decision in an effort to make it seem defensible.

But there was a reason why the Kansas Supreme Court focused on the distribution of Playtex products and placed virtually no weight on the presence in Kansas of the underlying tort litigation. A contact counts for jurisdictional purposes only if it is initiated by the defendant. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); Pet. 13 n.5. Playtex did not initiate the tort suit; it was haled into federal district court as a defendant. The tort litigation therefore does not constitute a separate jurisdictional contact for purposes of due process analysis. (Respondents' wholly unconvincing responses to this argument (Br. in Opp. 17 n.11) are further evidence of its correctness.)[2]

With respondents' embroidery stripped away, it is apparent that there is not a sufficiently close relationship between this action on the insurance contracts and the retail sale of Playtex products in Kansas. Upholding specific jurisdiction here would go far beyond the prior cases considered by the Court, in which jurisdiction over the defendant in a tort action seeking damages for injury inflicted by the defendant's product was based on the distribution of that product within the state (see, *e.g.*, *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984)) and jurisdiction over the defendant in a contract action was based upon the making and performance

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[2] Moreover, it is far from clear that Playtex's participation in the tort litigation would constitute a relevant contact under state law. The Kansas courts concluded that Playtex was subject to jurisdiction under the state long arm statute because the claim arose from the "'[t]ransaction of business'" in Kansas (Pet. App. 9a (citation omitted)). It is most unlikely that a defendant's involuntary participation in litigation would be considered "transact[ing] * * * business" under Kansas law. Accordingly, respondents are forced to defend the Kansas Supreme Court's ruling on a basis that would violate state law.

of the contract within the state (*Burger King Corp.*, *supra*).

Like the Kansas Supreme Court, respondents never come to grips with the fact that this case involves a relationship between forum contacts and cause of action significantly more attenuated than that present in any prior case.[3] Respondents simply assert repeatedly that there is a sufficiently close relationship here, relying upon that conclusory incantation as a substitute for analysis. Upon examination, however, the relationship here is far too remote to satisfy due process. See Pet. 12-17. The decision below accordingly should not be permitted to stand.

II. THE CHOICE OF LAW ISSUE ALSO WARRANTS THIS COURT'S ATTENTION

The Kansas Supreme Court held that its choice of law decision comported with due process because Kansas public policy required the application of Kansas law. Respondents do not defend that rationale, apparently recognizing that it is inconsistent with this Court's precedents. See Pet. 23-24. Respondents instead agree that the governing rule is the standard set forth in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), and assert that the lower court's determination may be upheld under that test.

The similarity between the jurisdiction and choice of law inquiries underlines the significant "gatekeeping" function performed by the due process limits on personal jurisdiction. Once a forum may assert jurisdiction over a non-resident defendant, the Constitution affords it con-

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[3] Thus, respondents argue (Br. in Opp. 18) that Playtex could have foreseen being haled into court in Kansas, because the insurance contracts covered risks arising in Kansas. But the fact that Playtex might have been able to foresee defending product liability tort actions in Kansas would not give Playtex any reason to foresee being haled into a Kansas court in an action on the insurance contracts themselves.

siderable leeway in adjudicating the dispute. The forum has considerable discretion in both choosing the applicable substantive law and applying that substantive law to the particular case. See *Sun Oil Co.* v. *Wortman*, 108 S. Ct. 2117, 2126-2128 (1988); *Phillips Petroleum Co.* v. *Shutts*, *supra*. For example, the forum may apply its own statute of limitations. *Sun Oil Co.* v. *Wortman*, 108 S. Ct. at 2120-2126. Because the constitutional constraints on choice-of-law are relatively loose, fairness and federalism interests are most effectively protected at the outset—by limiting the forum's power to assert jurisdiction over a nonresident defendant—if they are to be protected at all.

Respondents' arguments with respect to the choice of law issue are for the most part a reprise of their contentions with respect to the jurisdictional issue, but a few additional points are worth noting. To begin with, respondents' *Shutts* analysis proceeds (Br. in Opp. 24-25) from the wholly unsupported premise that Delaware law may not be applied to this dispute. Delaware, which is Playtex's state of incorporation and the place where payment was to be made under the policies, plainly has a sufficient interest in this dispute to apply its own law.[4]

Furthermore, respondents rest much of their argument on the choice of law principles codified in the *Restatement (Second) of Conflict of Laws* (see Br. in Opp. 26-27 & n. 17). But respondents conveniently ignore the fact that the Restatement accords considerably less significance to the state in which the risk is located

[4] Respondents' discussion (Br. in Opp. 18-19) of the terms of the insurance policies is misleading. Despite respondents' frequent references to "ultimate net loss," there is no dispute that the policies were pure indemnity contracts. Moreover, the "ultimate net loss" in the Kansas tort action was paid in Kansas only because respondents chose to pay the plaintiff directly rather than (as the policies provided) paying Playtex in Delaware. Significantly, any indemnity payment to Playtex of punitive damages would take place in Delaware.

"where the policy covers a group of risks that are scattered throughout two or more states." *Restatement (Second) of Conflict of Laws* § 193, comment b (1971).

Finally, respondents err in their portrayal of the expectation of the parties regarding the applicable law. Playtex's disclosure in an SEC filing of the truism that "certain state laws place limitations on coverage for punitive damages" (Br. in Opp. 29) says nothing about whether Playtex expected Kansas law to apply in a particular case. And the fact that a Playtex witness testified that the applicable law would be determined on a case-by-case basis (*ibid.*) does not stand for the proposition that Playtex was aware that Kansas law might apply to these insurance contracts, but rather evidences the parties' understanding that a state with appropriate jurisdiction over an insurance contract dispute would apply its legal rules, including its choice of law rules, to resolve that dispute.

In sum, respondents have not presented a single convincing reason why the Court should decline to review the judgment in this case, which "cannot be squared at any level with this Court's decisions" (Am. Br. 4). The petition should be granted with respect to both questions.

Respectfully submitted.

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